BLANK PAGE

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM 1940

No. 537

FASHION ORIGINATORS GUILD OF AMERICA, INC.
ET AL.

v.

FEDERAL TRADE COMMISSION

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

CHARLES B. RUGG
MILTON C. WEISMAN
Counsel for Petitioners

ARCHIBALD COX
MELVIN A. ALBERT

PRESS OF GEO. H. ELLIS CO., BOSTON

BLANK PAGE

INDEX

CITATIONS

Page

Cases:

Page

Cases:

Page

Cases:

Page

Miscellaneous:

BLANK PAGE

In the Supreme Court of the United States

OCTOBER TERM 1940

No. 537

FASHION ORIGINATORS GUILD OF AMERICA, INC.
ET AL.

v.

FEDERAL TRADE COMMISSION

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit is reported 114 F. (2d) 80 and is printed R. 4671-4679. The findings and order of the Federal Trade Commission are printed R. 107-148.

JURISDICTION

The decree of the Circuit Court of Appeals was entered August 24, 1940. The petition for a writ of certiorari was filed October 31, 1940 and was granted November 25, 1940. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the systematic unauthorized copying of garments of original design is unfair competition against which the originators of the designs may protect themselves without violating Section 5 of the Federal Trade Commission Act by collectively refusing to deal with retailers while they are knowingly marketing such unauthorized copies.

2. Whether under the circumstances evidence of the economic necessity for their program and of its beneficial consequences was erroneously excluded in a proceeding under Section 5 of the Federal Trade Commission Act against manufacturers of garments of their own original designs for collectively refusing to deal with retailers marketing unauthorized copies of those original designs.

3. Whether under the circumstances evidence of the economic necessity for their action and of its beneficial consequences was erroneously excluded in a proceeding under Section 5 of the Federal Trade Commission Act against retailers who, at the request of certain manufacturers, refused to market unauthorized copies of garments designed by those manufacturers.

STATUTE INVOLVED

The statute directly involved is Section 5 of the Federal Trade Commission Act, 38 Stat. 719, U.S.C. Tit. 15, Sec. 45. Indirectly involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, U.S.C. Tit. 15, Sec. 1, 2. The texts of these sections are printed in the Appendix, *infra*, p. 68.

STATEMENT

A. *Facts*

A decade ago the ladies' garment manufacturing industry was divided into two well defined groups of manufacturers (R. 4311, 4312, fol. 12933, 12934).[1] First, were those manufacturers whom we may call originators (R. 4311, fol. 12933). They sent representatives to the style centers of the world (R. 4312, fol. 12936). (Formerly it was Paris, today and tomorrow New York.) The representatives observed the prevailing styles[2] and predicted, if they could, the fashions[3] to come (*ibid*). Thereupon the originator put the skilled designer to work; he interpreted and adapted the prevailing fashions into many different original designs[4] (R. 4312, fol. 12935; R. 4313, fol. 12937). Then the best designs were embodied into samples and finally into any number of dresses the manufacturer saw fit (R. 4313, fol. 12938, 12939). Those he sold to retailers and the retailers, to consumers. Without copying, the style life of a garment (the period between the first order received by the manufacturer and the last) would have been about three months (R. 4313, fol. 12939).

---

[1]The Federal Trade Commission excluded all evidence of the basic facts and economic conditions necessary to full comprehension of the issues presented. The facts stated under this heading include those which were found by the Commission, which appear in evidence which was uncontradicted and which appear in the petitioners' offer of proof (R. 4309-4327). Substantially all of the facts stated were found as facts by Judge Brewster on affidavits and by a master after prolonged litigation in *Wm. Filene's Sons Co.* v. *Fashion Originators Guild of America*; his report was confirmed by the district judge and the order was affirmed. See 14 F. Supp. 353; 90 F.(2d) 556.

[2]A "style" is a characteristic or distinctive artistic expression or presentation. NYSTROM, FASHION MERCHANDIZING, The Ronald Press (1932) 33. The style of a dress is the sum of its general lines and characteristics (R. 4312, fol. 12934).

[3]A "fashion" is a style accepted and used. NYSTROM, *loc cit. supra.*

[4]A design is a particular adaptation or interpretation of a style. *Ibid.* The design of a dress is the sum of all its particular details, hence any style may be embodied in innumerable designs (R. 4312, fol. 12935). These definitions were accepted in the National Recovery Administration. See JOHNSTON AND FITCH, DESIGN PIRACY AND ITS TREATMENT UNDER N.R.A. CODES, Office of National Recovery Administration, 1936.

Living off the originators and unable to exist without them were the manufacturers known to the industry as "copyists"[5] or "style pirates".[6] (R. 4311, fol. 12933). They made no effort to develop their own designs; on the contrary their livelihood was manufacturing dresses embodying designs which were literal copies of the designs of the originators (R. 4314, fol. 12942). Access to the originals was easily gained; sketches were made by the copyist at fashion shows or in retail stores (R. 4315, fol. 12943). Often, however, he was not content to wait until publication but gained access to the originals by fraud, burglary or bribery (R. 4314, 4315, fol. 12942-12945). Then the copyists manufactured the copies, using cheap materials and poor workmanship, and put them on the market through retail outlets (R. 4319, fol. 12955, 12956).

The effect upon the consumer was immediate. She had no way upon superficial examination in the store of knowing when a dress was an original and when it was a copy (R. 4320, fol. 12958). Yet women insist upon fashionableness and distinctiveness in their attire (R. 4324, fol. 12971-12972). The woman who bought an original, therefore, was outraged, if, window shopping, she saw apparently identical dresses all down the street selling for less than she had paid. But the dresses were never the same. They were made of cheaper materials and workmanship and for that reason cost less (R. 4318, fol. 12953). Consumers in all price ranges demanded that originals be separated from copies (R. 4320, fol. 12960).

---

[5]A "copy" is not any garment which is a reproduction of the first one made but is any unauthorized reproduction of an original design. Authorized reproductions made by the creator or originator of the design, therefore, are known as "originals" and unauthorized reproductions as copies. In practice, all copies are made by manufacturers who make substantially nothing but copies. (R. 4311, 4314, fol. 12933, 12942).

[6]"Style pirates" is a misnomer; "design pirates" would be the more accurate term.

The consumer's anger was directed, of course, at the retailer. In a world where fashion rules it was useless for the retailer to try to explain that the similarity was superficial and that the copy down the street sold for less because it was cheaply made of inferior materials. Neither could he hope, by showing that no one could know where the copyist would strike next, to satisfy his customers who complained that he did not sell modish garments. In both respects his reputation and, therefore, his business suffered (R. 4318, fol. 12954). But copying coupled with women's demand for distinctive clothes damaged the retailer in other ways also. Anticipating that a design would be successful he would stock a number of garments embodying it. When copies appeared he could not sell them; a limited number of garments of one design will satiate the market not because the demand for garments is limited but because a garment could not be sold when its design became common. If the copy was cheap, the retailer was hurt worse, not because the cheap copy filled a demand for garments which the retailer of originals was seeking to supply but because wide sales of the design to customers in any price range shifted the demand in other price ranges away from that design to another and again left the retailer stocked with garments which he could sell only at a loss if at all. For one or more of those reasons merchants who handled "high styled" dress creations ran their departments at a loss. And the loss was attributable to style piracy only. (R. 4318-4319, fol. 12954-12955.)

It was the originator manufacturer, however, who suffered the most. First, his sales on the initial showings were reduced to a minimum. The retailers, fearful of losses due to stocking any design which might be widely copied, would not place large orders but bought from hand to mouth. The manufacturer in turn could not plan his production intelligently. He could not employ help

steadily. He could not buy or manufacture in bulk. His costs, therefore, were tremendously increased (R. 4316-4317, fol. 12948-12949). Second, where the copyist destroyed a retailer's market for designs he had stocked, the retailer returned the dresses to the manufacturer. Or, if the design had been pilfered surreptitiously and the copies appeared before the originals were shipped, then the order was cancelled. Style piracy was the chief cause of cancellations and returns (R. 4316, fol. 12946). Third, style piracy deprived the manufacturer of "reorders". Retailers never stock very many garments of any design. In the absence of copying they would have reordered many dresses in the successful designs and on those large reorders the originator could make up the cost of design creation. The copyist here did the greatest damage. The successful design was at once made up by him into copies which were rushed on the market. When they arrived the style life of the dress was ended; the originator received no reorders for the design having become common could no longer be sold (R. 4317, fol. 12950-12951; R. 4314, fol. 12941). Without reorders no originator could survive; upon them depended the success or failure of his business (R. 4314, fol. 12941). Finally, the originator's accounts receivable became harder to collect. The retailer who had lost heavily on a widely copied line demanded and to preserve the outlet had to be given some discount off the original purchase price (R. 4319, fol. 12957).

Style piracy directly caused those four evils. Those evils caused disintegration of the industry (R. 4321, fol. 12963). Design originators could not continue in business profitably. Bankruptcies were frequent. The annual business mortality rate was twenty-five per cent (R. 4315, fol. 12945).

Style piracy injured the laborer also because uncertainty in respect to reorders made it impossible for the manufacturer to space production evenly (R. 4317, fol. 12951). Manufacturing became a series of sprints between originators to make and sell their dresses and pirates to copy quickly the design of each popular dress, followed by slack periods in which all waited for another popular design to be developed. This injured everyone, but most of all the laborer. For him there were nothing but short bursts of employment—for long hours at minimum wages if he was employed by the copyist—succeeded by layoffs (R. 4321, fol. 12962-12963).

Originators and retailers alike realized that they were confronted with a choice between voluntary action and business disaster (R. 4322, fol. 12964; R. 4325, fol. 12975). They chose the former. In seeking to defend themselves against style piracy they had little recourse but to adopt some form of self-help. The copyright laws were not applicable; a dress design is not within the category "works of art; models or designs for works of art". 35 Stat. 1076, U.S.C. Tit. 17 §5. See *Kemp & Beatley* v. *Hirsch*, 34 F. (2d) 291, (E.D.N.Y.). JOHNSTON AND FITCH, *op. cit. supra*, n. 4, 96-98. The design patent law involved expenditures disproportionate to the value of a design and delay exceeding the style life of the garments. R.S., §§4929, 4933 amended by 32 Stat. 193, amended by 53 Stat. 1212, U.S.C. Tit. 17 §73. (R. 4325, fol. 12973.) Court help based on common law principles might have been obtained once a precedent was made; but in daily practice the court processes would have been too complicated and slow (Cf. R. 4325, fol. 12973).

In 1932, against this background, the petitioner Fashion Originators' Guild of America, Inc. (hereinafter referred to as FOGA) was organized for the purpose of saving the industry from the evil of style piracy (R. 122, fol. 364, 365). To accomplish that end it adopted a pro-

gram which would impede the copyist yet would not regulate prices, production or quality. It was this:

At the outset FOGA went to certain retailers and asked them to agree to sell no copies of FOGA designs. Many perceiving the advantage to the industry agreed (R. 124, fol. 370-371). Others were given these alternatives—to sell the garments made by FOGA members and to sell no copies of them, or to sell copies of FOGA designs and to look elsewhere for original creations (R. 124, fol. 372). They made their choice when the alternatives were put up to them—and although the prestige of FOGA members may have influenced their decision, the choice was freely made and the alternatives fairly stated (R. 220, fol. 658).

To give an initial basis for executing the program FOGA established a design registration bureau where each member registered each of his designs. But registration was not evidence of originality; that issue if ever raised was determined later. Registration simply dated the design and limited the claim of originality (R. 4327-4329).

To seek out copies was unnecessary. Cooperating retailers swiftly called them to the attention of FOGA. If there was substance to the charge both the manufacturers were notified; the FOGA arbitration machinery was set in motion. A panel of arbitrators had been established to adjudge what was a copy and what was not (R. 4335, fol. 13002, R. 4337, fol. 13010). None of them represented FOGA manufacturers; all were merchandise managers and buyers for retail stores and so had no interest in any prospective controversy (R. 4337). The manufacturer of the alleged copy could challenge anyone drawn from the panel until three satisfactory to him were selected or, if there were none, he could name one man, FOGA would name another, and the two a third (R. 211, fol. 631-632; R. 4338-4340, fol. 13014-13019). Potentially they had two ques-

tions to decide: the first, whether the alleged original was in fact an original; the second, whether the alleged copy was in fact a copy. On both questions each party was heard and the committee decided (R. 4340-4341, fol. 13020-13022).[7]

If the FOGA member did not establish his claim, that was an end of the matter (R. 4341, fol. 13021). If the garment was adjudged a copy of an original, the copyist could appeal, if he wished, to a second committee made up of merchandise managers, store owners and heads of New York offices whose decision was final (R. 4341, fol. 13022, R. 4342-4343, fol. 13026-13028). If there was no appeal or if the second panel like the first found copying had occurred, then the retailer was asked to remove the copy from sale. If he did not, a "red card" was issued and the FOGA members refused to deal with him, but only until he ceased to sell copies of their goods (R. 215; R. 3277, fol. 9831).

To acquaint retailers with decisions of the arbitrators shoppers employed by FOGA visited them (R. 205, fol. 613). They were not spies. They shopped openly and disclosed their purpose and identity (R. 4336, fol. 13008). Their chief duty was to discover by comparison of the manufacturer's identifying order number whether retailers were marketing adjudged copies of FOGA original designs (R. 4345-4346, fol. 13035-13036).[8] If one was, the retailer was informed of the decision, comparison being made by manufacturer's number. The retailer might withdraw the copy. If he did the matter ended. If he did not FOGA was notified and persuasion attempted. If the retailer persisted, a "red card" might issue. (R. 215.)

---

[7]Indeed, even if the copyist did not appear, the question of whether copying had occurred was always raised by the committee itself and decided without hearing the FOGA manufacturer. (R. 4342, fol. 13024.)

[8]Sometimes shoppers received the complaints that a cooperating retailer was selling copies and forwarded the complaints to FOGA (R. 203, fol. 623; R. 4336, fol. 13006).

The FOGA program took the above form because it was appropriate to remedy the old evils yet at the same time was not broader than was necessary if it was to be effective. The boycott is narrow in scope. It is invoked only against retailers whose policy is to sell copies of FOGA designs. When they stop, members are free to deal with them (R. 3277, fol. 9831). Protection is limited as to subject matter, as to time and as to place. Only designs which in fact are the original designs of FOGA members are protected; "imports", licensed copies of foreign designs, are not (R. 4324, fol. 12970).[9] Protection lasts only for a short period—in practice, for about three months.[10] Thereafter, in following years, anyone may make copies. Protection is granted only in a limited number of places. All the copyists' wares may be hawked in stores which do not sell FOGA garments; retailers affected by the FOGA program are less than one-fifth of the available outlets.[11] Any retailer may sell copies of originals designed by a manufacturer not a member of FOGA. And any retailer selling copies of FOGA designs may buy originals else-

[9]It has sometimes been claimed that copies of French creations for which the importer buys a license should be protected. FOGA does not grant that protection.

[10]The FOGA rules provided for protection for six months. Exhibits 1-A–1-T. But a season lasts only three months, R. 4313, fol. 12939, so that no one would be interested in copying or preventing copying after that length of time until the following year, by which time the six months' period for protection would have expired.

[11]The Commission found that approximately 12,000 retailers cooperated in the FOGA program (R. 125, fol. 373). About 400 were red carded (R. 127, fol. 381). In 1935 there were approximately 62,766 retail stores selling type of ladies garment with which FOGA was concerned. Therefore the FOGA program directly affected only 19.8% of the outlets.

The figure 62,766 is made up of the figures given by the Department of Commerce, Census of Business: 1935, Retail Distribution Vol. II, p. 12, for the following classes of retail stores:

Dry goods	28,709
Department	4,201
Family clothing	7,881
Women's Ready to Wear	21,975

These classifications all sell women's garments other than accessories. See *Id.*, Vol. I, part IV.

where; less than fifty per cent of the originators were members of FOGA.[12] In other words, the petitioners, both manufacturers and retailers, did not seek to keep all copies, even all copies of FOGA garments, from the market but simply to keep copies of any FOGA designs from being sold at the same time in the same store as any FOGA originals.

The FOGA program was successful. It was the greatest single factor in stabilizing the industry to the benefit of manufacturer, retailer, consumer and laborer. It resulted in increased competition on an ethical, fair, competitive basis and has resulted in a decrease of failures and of losses in the industry. The evils which previously had threatened the existence of the industry were largely eradicated. (R. 4325, fol. 12974-12975.)

This result was accomplished with a minimum of injury to anyone. The only persons whom the Federal Trade Commission found to have been injured were the copyists and the retailers who were "red carded". (R. 130, fol. 389.) The hardship to copyists, however, was limited by four factors. First, there were ample retail outlets to which they might sell copies of FOGA designs; less than one-fifth of the retailers were cooperating with

---

[12] FOGA had 176 manufacturer members in April, 1936 (R. 122, fol. 365). Only 81 were manufacturers in the price range of $16.50 wholesale (R. 4394, fol. 13182). At the same time, there were over 423 firms in that price range available to those "red carded" by FOGA (R. 4389, fol. 13167). Few, if any, of those would be copyists—50% is an excessive estimate; but even on that hypothesis, the estimate made in the text is moderate.

The Federal Trade Commission found that FOGA members manufactured 83.99% of the garments in the price range of $10.75 and up wholesale and 38.8% in the price range of $6.75 and up (R. 122, fol. 364). The first figure is an obvious error in printing which, we think, respondent will admit. The figure should be 63.99%, for it must be based upon Exhibit 941, the highest estimate in the record. Assuming the figures of 38.8% and 63.99% to be based upon competent testimony, it is obvious that there was an ample supply for stores with whom FOGA members refused to deal. There appears to be no evidence to support the finding that *all* retailers require FOGA garments (R. 121-122, fol. 363-364). And it is absurd. It is common knowledge that there are many retailers who do not sell any dresses costing $6.75 wholesale for that would be in excess of $10 retail.

FOGA.[13] Second, they might sell everywhere copies of designs other than those originated by FOGA. There were many of them.[14] Third, the copyists had free rein the ensuing year; protection in theory was limited to six months (Exhibit 1), in practice to three.[15] Fourth, there was ample opportunity for the copyists to compete honestly; plenty of able designers were available (R. 4324, fol. 12971). The loss to the red-carded retailers, moreover, resulted from their own deliberate and persisting choice. Had they agreed to the program they would have been better off than they were prior to the formation of FOGA (R. 4318-4319, fol. 12953-12956; R. 4325, fol. 12975).

The benefits of the program were accomplished without any injury to the consumer. On the contrary her interests were advanced.

First, the FOGA program does not regulate the price structure or increase the cost of fashionable designs to low income consumers. FOGA has never directly or indirectly interested itself in the price at which a manufacturer or retailer may sell his products (R. 4367-4368, fol. 13101-13102). The Federal Trade Commission has not even hinted that the FOGA program enhanced prices or affected them in any manner in any range—a silence which is eloquent in view of the known importance and practice of making such a finding in anti-trust cases which permit it.[16] Whether the program does not regulate price because there is an excess of production among FOGA members, as the court below reasoned (see R.

---

[13]See note 11, *supra*.

[14]See note 12, *supra*.

[15]See note 10, *supra*.

[16]The court below stated "the case at bar is not one of price-fixing" (R. 4677). See also *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild*, 90 F. (2d) 556 at 560.

4677), or whether because the pirated design still competes in the market through retailers who did not cooperate with FOGA or whether for some other reason, is immaterial. The fact is not a matter as to which speculation could take the place of proof. The FOGA program was in effect for many years before the hearings. The Commission, upon which the burden rested, deliberately refused to look to experience.

Second, the FOGA program does not parcel out or limit production of dresses (R. 4368, fol. 13102). The uncontradicted testimony was to that effect. The Commission did not suggest the contrary. Neither can it be reasoned that the program threatens to reduce the supply of modish dresses because it prevents copies from being sold by cooperating retailers. For all that appears, originals may take their places in the market or the copies may find buyers in non-cooperating stores. This case, therefore, does not involve regulation of the quantity of garments or designs available to the consuming public.

Third, the FOGA program does not deteriorate quality, the last great concern of the consumer (R. 4368, fol. 13103-13104). That must be taken as true on this record for the Commission refused to hear evidence on the point. And it is obvious. Today quality in ladies' garments is not measured by utility as was the homespun of the frontier. In a fashion goods industry style and originality are the criteria of quality. The consumer assumes the materials and the workmanship of all dresses in a given price range to be uniform (R. 4324, fol. 12971-12972). Hence, the elimination of the deceptive selling of a multitude of copies improves the quality of the products where as here it does not by raising prices keep exclusive designs from the consumer (Cf. R. 4320, fol. 12958-12960).

B. *Proceedings Before the Federal Trade Commission*

On April 16, 1936, the Federal Trade Commission issued its complaint against FOGA, its members and certain cooperating retailers alleging them to be guilty of unfair methods of competition under Section 5 of the Federal Trade Commission Act (R. 3-25). Hearings were held upon the complaint and answers. Notwithstanding that the petitioner proved or offered to prove all the facts we have stated the Commission then made only the following findings pertinent to the question presented:[17]

The members of FOGA, competing among themselves and with other manufacturers, ship and sell their goods in interstate commerce (Par. 7).[18] They are a dominant factor in the industry for all retailers require their product (Par. 8). In 1932 FOGA was organized to prevent style piracy (Par. 9) and to accomplish that purpose it has done the following acts: It has agreed with certain local associations of retailers not to sell to non-members of those associations in exchange for the associations' agreements that their members would not sell copies of FOGA designs (Par. 10). It persuaded many retailers voluntarily to adopt the policy of buying merchandise only upon a warranty that it was not a copy of an original creation of an FOGA member and of withdrawing from sale and returning to the manufacturer any merchandise adjudged by the "piracy committee" of FOGA to be such a copy (Par. 11). In other cases retailers were induced to adopt the policy by threats that the dress manufacturer members of FOGA would not sell to re-

[17]Many of the findings deal with relatively unimportant FOGA activities. Most of them had been abandoned prior to the issuance of the order of the Federal Trade Commission. The petition for certiorari raised no questions in respect to those parts of the order; hence we shall omit all reference to the findings upon which it was based.

[18]The findings are set forth R. 108-134. For convenience in reference the record citations in this summary are to the numbered findings of the Commission.

tailers who refused to adopt it (Par. 11). Such threats have been carried out and in 1936 there were 12,000 cooperating retailers (Par. 11). A design registration bureau was established at which FOGA members registered their designs; registration raised no presumption of originality but dated the claim (Par. 12). "Shoppers" ascertained whether any retailer was selling what appeared to be a copy of a registered design; if one was, the fact was reported to FOGA (Par. 14). A "piracy committee" decided after notice and hearing whether or not the garment complained of was in fact a copy of an original design. If it held the registered design to be original and the garment to be a copy, the copyist had an appeal; then the status of the garment was fixed (Par. 13). A list of retailers who refused to adopt the policy recommended by FOGA or who refused to abide by the decision of the piracy committee was maintained by a card index system in which those who would not cooperate were marked with a red card. In March, 1936, there were 400 of them (Par. 15). This program has caused loss to the retailers who refused to cooperate and to the copyist manufacturers (Par. 28, 29).

At the hearings the petitioners did not deny most of those findings.[19] The petitioners' real defense was that the mechanical program could not properly be studied as an isolated skeleton clothed in dry terms of "coercion" and "boycott" but must be judged as we have attempted to describe it, as a living force in a functioning economy. They did show how the program operated. They did prove that they have not fixed or sought to fix prices, have not limited or tried to limit production, have not divided or sought to divide markets or caused or sought to cause deterioration of their products (R. 4367-4368). They offered to prove facts compelling the ultimate fac-

[19] A few are based on errors in arithmetic or are obviously absurd, but so far as they go most of the above findings are accurate. See note 12 *supra*.

tual conclusion that the practices of FOGA were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils flowing from the pirating of original designs and had in fact benefited all four (R. 4308, fol. 12922; R. 4307-4327). The Commission, however, refused to hear that evidence (R. 4307-4327). It repeatedly ruled that the practices of FOGA could not be justified by any evidence of "what the necessity of the action [of FOGA] may have been" and excluded the proffered proof (see, *e.g.*, R. 4308, fol. 12922).

On February 8, 1939, on the basis of the above findings, the respondent entered a cease and desist order (R. 135-148). The first part before this Court for review is the provisions which forbid the manufacturer petitioners to combine to induce retailers not to market copies of their own original designs and to induce each other not to deal with retailers who are selling them (R. 140; R. 141, fol. 422-423). The second is those provisions which forbid the retailer petitioners from voluntarily agreeing among themselves and with the manufacturer petitioners not to sell such copies (R. 147-148, par. (b) and (d)).

Thereafter the petitioners filed a petition in the Circuit Court of Appeals for the Second Circuit seeking review of the order of the Federal Trade Commission and to have it set aside (R. 1a-32a). On July 22, 1940, that court handed down its opinion affirming the order in part but modifying it in certain details (R. 4679). On August 24, 1940, a decree was entered in accordance with the opinion (R. 4684-4694).

ASSIGNMENT OF ERRORS

The Circuit Court of Appeals erred:

1. In entering a decree affirming and enforcing with modifications the order of the Federal Trade Commission.

2. In ruling that a garment manufacturer is entitled as a matter of law to engage in systematic copying (as distinguished from isolated reproduction) of original creations sold by manufacturers of garments of original design.

3. In ruling that the FOGA program was an unlawful boycott which might not be justified by the evidence offered by the petitioners.

4. In ruling that the Federal Trade Commission did not err in excluding evidence of conditions in the garment industry before and after the adoption of the FOGA program, of the nature and effect of style piracy, of the reason for adopting the particular program and of the fact that the program was reasonable.

5. In ruling that the FOGA program was unlawful because it results in each member manufacturer acquiring a "monopoly" of each of his own original garment designs.

6. In ruling that the FOGA program was unlawful because the combination might in the future fix prices or regulate production.

SUMMARY OF ARGUMENT

I.

Style piracy is unfair competition which equity would enjoin at the suit of an originator. A dress has its chief value not on account of the utility of the cloth or the artistry of the lines and colors but from the freshness of its design. The business of designing and selling women's garments is, on account of woman's nature, therefore, the business of creating and publishing the news of the world of fashion. A dress in a commonplace design has no larger market than last week's newspaper.

The style pirate unlike the originator does not create his own designs. Gaining access to originals by any means at hand he deliberately, continuously and systematically makes and retailers sell, often as originals, Chinese copies of those which are or promise to be successful. That fills a part of the demand which the originator might have filled and—far more important—destroys the greatest part of the demand for originals. The demand is destroyed because the copies deprive the originals of their freshness; customers who would have bought them select other garments of a design less common. Hence the instant case is on all fours with *International News Service Co.* v. *Associated Press,* 248 U.S. 215. But, regardless of precedent, we submit, style piracy is unfair competition as a matter of principle. It is not necessary to show a "property right" in each design or a "passing-off". There is a tort (we call it "unfair competition") if one trader injures the business of another by depriving him of sales by some practice which society through its spokesmen condemns as "wrongful". Style piracy does injury to originators' businesses; it deprives them of sales. Style piracy is wrongful; it is a type of the professional parasitism which equity has not hesitated to forbid, which industry almost unanimously proscribed in the NRA codes and which the Federal Trade Commission itself has condemned in Trade Practice Conferences. Both elements of the tort, therefore, are present.

The FOGA program has no consequence except to limit this unfair competition of the style pirate by keeping the products by which he competes unfairly out of the stores in which FOGA originals are marketed. Equity would give that relief. The determination of whether a garment is a copy and therefore one by which the copyist competes unfairly is made by an impartial committee composed of the very experts whose testimony would

receive the greatest weight in court. The commission has not found that any one except the style pirate and the retailer allied with him is injured.

Since style piracy is unfair competition and since the FOGA program has no effect but to limit it and in limiting it does not injure the consumer, it follows that the FOGA program is not an unfair method of competition under Section 5. Section 5 develops the law of torts in the public interest but retains the essential characteristics of that law and therefore should not be construed to bar reasonable self-help. Moreover, Section 5 was not intended to and does not protect from interference trade which is unlawful and has no right to exist.

II.

The Federal Trade Commission erred in refusing to hear evidence of the causes and consequences of the FOGA program and of the social and economic conditions in which it functioned. The only conceivable basis for branding the program unfair is that it involves combined action. Each petitioner could have done alone what the petitioners have done collectively without danger of criticism. The determination of whether a combination violates Section 5 turns upon an evaluation of its social and economic desirability—the act supplies no more definite test—and that evaluation can be made in a case like this one only when all the relevant facts have been uncovered. That is true from the viewpoint of the two expositions of policy here relevant—the Sherman Act and the common law precedents.

Whether FOGA violated the Sherman Act could not be determined by logic alone. Notwithstanding slight differences of expression, there has been unanimous agreement that the eventual question under the Act is whether a particular restraint does or threatens injury to the

consumer's interests—whether it is "unreasonable"—and that the only workable technique for deciding that question is the study of the causes, functioning and consequences of the restraint. In three cases apparent exceptions to that general principle exist—where prices are fixed, where production is limited and where quality is deteriorated—but the exceptions are more apparent than real for the true basis of the refusal to examine further is that the direct and immediate injury to the consumer is so real and so serious as to make it vain to search for compensating benefit. The case at bar, however, comes within none of the three exceptions. The Commission did not even suggest that to curb style piracy would increase the cost of garments of modish designs or would decrease the number of garments or of designs or would deteriorate their quality. Therefore, the Commission erred in refusing to hear the evidence which would make it possible to evaluate the effect of the program upon the interests involved and thereby to determine whether it was "unreasonable" or "reasonable".

The offer of proof showed that the FOGA program was "reasonable". If all the manufacturers and all the retailers could agree not to make or sell copies, the agreement would be lawful. *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344; *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553, 598. The sole purpose and sole effect of any agreement to curb style piracy in the garment industry is to preserve it from the devastating effects of that practice. The mere fact that the destructive practice is checked without the consent of the parasite who practices it does not render a different rule applicable. The Sherman Act does not enlarge his rights. And the decisions of this Court make it clear that although perhaps a combination of traders may not lawfully exclude another trader from any part of the market, nevertheless they may lawfully condition his

entry into it upon his abandoning practices which undermine the entire industry.

From the viewpoint of the common law also the exclusion of the proffered evidence was erroneous. A boycott although *prima facie* unlawful may be justified. Competition has quite steadily been held a justification. But we do not stand upon that proposition. The justification pleaded is even more apparent when the effect of the boycott on all the conflicting interests involved is considered. The petitioners offered to prove that even if the boycott did hurt the copyist and the retailer who deliberately allied himself with the copyist, nevertheless it benefited the manufacturer, retailer, laborer and consumer. Plainly the gains outweigh the losses.

The fundamental error in the Commission's procedure, therefore, lay in failing to exercise the very function for which it was created. It has often been recognized that the courts are handicapped in regulating business practices because their facilities and expertise are insufficient. At no time was that fact more keenly felt than when the Federal Trade Commission was created. The purpose of Congress was to provide for expert factual judgments by establishing as the primary body a commission which could properly investigate and analyze the factual data in the light of particular competitive conditions. The instant case presents in acute form the very type of controversy which it was intended the Commission should deal with in that manner. Since it did not, the cause should be remanded in order that the administrative function be exercised.

ARGUMENT

I.

The Petitioners' Program Does Not Violate Section 5 Because Its Sole Consequence Is To Curb the Unlawful Competition of the Style Pirate.

FOGA was organized and exists for the primary purpose of checking style piracy (R. 122, fol. 365). Its members and other manufacturers originate designs. Copyists, on the other hand, live by reproducing without authority those designs created by originators. The business of the copyist is the deliberate, continuous and systematic appropriation of the benefits of the originator's efforts. He damages the originator's business by depriving him of customers who would otherwise surely be his. So to steal a free ride and injure the originator is unfair competition in which the copyist has no right to engage. The FOGA program has no effect except to limit those wrongful activities. Therefore that program is not an unfair method of competition. We consider these points seriatim.

A.

"Style piracy" is unfair competition in which the copyist has no right to engage.

The development of designs for ladies' garments is a major function of an industry ruled by the dictates of fashion. The "style" comes first; it is the broad outline, the general characteristics, the type from which the design is developed.[20] Styles are fixed at fashion centers. There the representatives of the manufacturers of originals congregate to observe the styles and to pre-

[20] See note 2, *supra*.

dict their trend. Then by labor, skill, ingenuity and a flair they adapt and interpret the style *à la mode* into many different designs. (R. 4312-4313, fol. 12935-12938.)

Next, the manufacturer who originates designs makes and vends the dresses embodying them. Although as between two new designs it may be the artistic quality or attractiveness of a design which makes it successful, between two dresses the customer chooses accordingly as she believes one dress or the other embodies the very latest style and design (Cf. R. 4324, fol. 12971-12972). The business of manufacturing and selling ladies' garments is the business of creating and publishing the news of fashion.

An analogy may be helpful. The publisher of a large newspaper has a vast organization which collects and sells to the public information concerning current events. First are the reporters who go where the news is being made. They are comparable to the representatives of manufacturers in attendance at the fashion centers of the world. Next the reporters or editors write up and analyze what they observe. Some may notice this; others that. The good reporter or editor knows the public appetite and catches in his article the striking, the picturesque and the significant; the laggard does not. The writing of the news story is comparable to the interpretation of one's observation of a style into a design; the successful designer catches the striking line, turns the picturesque phrase and foresees the public demand. The news story then is embodied in paper and ink; the design in cloth and dye. The papers of one publisher have their greatest value when they carry the latest news. The information they contain gives them some value even when the news is old; and the paper itself has some uses. The publisher's ideal, however, is to obtain a scoop—to alone tell the public in his papers today what will be the headlines in others' to-

morrow. The closer the publisher comes to this ideal, the more valuable his papers. The position of the dress manufacturer is the same. A design keeps some value from the artistry even when it is old; and the cloth has some utility. Nonetheless, the manufacturer's, like the publisher's, ideal is in his dresses to illustrate exclusively the news of the world of fashion, to show today what well dressed women will wear next month and others the month following. Finally, the creator of a design, like the creator of a news story, can realize its value only by publishing it.

In the ladies' garment industry there has grown up a parasite—the "style pirate" or "copyist".[21] He makes no effort to collect the information of the fashion world; he employs no designers to interpret it and embody their interpretation into garments. At first he sits quiet but once someone else has designed a garment which has caught or appears likely to catch the public fancy he springs to action. Indeed, instances have been recorded where the copyists stole the actual design by burglary or by bribery without waiting to sketch it at a showing. (R. 4314-4315, fol. 12942-12944.) But since publication of designs is the originating manufacturer's livelihood, the copyist usually has no need to do more than buy a dress of each design he will copy. His next steps are to embody the design in dresses of his manufacture and to sell them. The copy is always meticulously and slavishly made; the copyist contributes nothing; he simply sells as his the designs produced by the other (R. 4314-4315, fol. 12942-12945). He deceives the customer by passing off his copies as originals (R. 4320, fol. 12958-12959).

The immediate consequence of style piracy is damage to the business of the originator; he loses sales. The reason is this: The market for garments of any par-

[21]See notes 5, 6, *supra*.

ticular design is limited by the desire of women to wear distinctive clothes representative of fashion trends (R. 4324, fol. 12971-12972). Once a certain number of dresses of one design are sold, the market is satiated. The copyist, therefore, by selling copies cuts down the reorders which would otherwise come to the creator of the design, causes the cancellation of orders and leads retailers to make returns (R. 4316; R. 4317, fol. 12951). Again the analogy may be helpful. If one newspaper carried an exclusive story of an internal collapse in Italy written after expense and effort by a skilled reporter, the story would have great value. If another publisher five minutes after papers carrying the story were on the street had out a paper containing the same story copied from the first, he would make sales and the first publisher would lose those he would have made. Here, as in the newspaper world, the demand is limited not by the purses and numbers of customers but by their demand for freshness. The pirate does not simply take the sales the originator would have made, but by selling cheap replicas of the design he prostitutes it and prevents the originator from selling his reproductions. Thus, although the copyist may not place his goods in the hands of consumers who would have bought from the originator, nevertheless his sales destroy the freshness of the design, and compel the customers who would have bought it from the originator to turn elsewhere for a different design.

The conduct of the copyist, then, like that of every cheat and parasite, is shocking to ordinary business morality. Even the copyist himself admits that. JOHNSTON AND FITCH, *op. cit. supra*, n. 4, 57-58. Also it results in injury to the business of the originator; the copyist takes some sales from him and destroys his chance to make others. Consequently, it is submitted that there are present all the elements necessary to make out a case of unfair competition against the copyist.

In urging that conclusion upon the Court we do not ask it to go beyond its own precedent. In *International News Service Co.* v. *Associated Press,* 248 U.S. 215, a defendant whose business was the distribution of news was enjoined for a limited period from selling news systematically and deliberately copied from publications of a competitor who had expended the money and skill needed to collect it. The Court held that there was unfair competition because the defendant had damaged the plaintiff's business by misappropriating what equitably belonged to the plaintiff. "The underlying principle is . . . that he who has fairly paid the price should have the beneficial use of the property." 248 U.S. at 240. See *A.L.A. Schechter Corp.* v. *United States,* 295 U.S. 495, 532. The compelling analogy between news piracy and design piracy leads to the conclusion that design piracy, like news piracy, is unfair competition. Cf. *Callman, Style and Design Piracy,* 22 J. OF PAT. OFF. 578, 586. The sole distinction is that, instead of papers, garments are involved, instead of information, designs.

The analogy between the *International News Service* case and the case at bar as well as the nature of the problem actually involved in both cases can best be analyzed by contrasting that problem with the one which that case has sometimes been thought to have involved. Many commentators have viewed the *International News* case as an example of the controversy in which an appreciation of the fairness of an originator's claim to the fruits of his labor presses against an acute consciousness that society "progresses" by the interchange of ideas and by the exercise of its forbears' instinct for copying. *E.g.,* Note (1934), 47 HARV. L. REV. 1419, 1426-1427; Note (1930), 14 MINN. L. REV., 537. Some of them have held the decision to proclaim a man's right to the fruit of his labors and to forbid any man to reap where the first has sown. *E.g.,* Note (1935), 33 MICH. L. REV. 822; Cf.

Callman, op. cit. supra, 580; *Rogers, Unfair Competition,* 17 MICH. L. REV. 490. Others of them have urged that it ought to be restricted to its particular facts and not treated as a precedent. *E.g., Handler, Unfair Competition,* 21 IOWA L. REV. 175, 191. It would seem, however, that neither view is correct. The difficulty arises partly from the repeated use of the concept "property" and the consequent insistence that for equity to grant relief against any copying is for the Court to recognize that any creator has a right to exclude all others from using his idea. The difficulty also arises from the notion that the action of unfair competition protects the property right of a trader in the marks and identifying dress of his merchandise which are associated with his good will, and that therefore an appropriation of such "property" is a prerequisite to an action for unfair competition. Cf. *Rogers, loc. cit. supra.* It is submitted that those two notions are based upon forgetfulness of the rudiments of the law of unfair competition. Cf. Note (1919), 19 COL. L. REV. 233, 238.

"Unfair competition"[22] is essentially a branch of the law of torts. A man's interest in his business is a subject of protection against unlawful invasion by others. Indeed, equity calls it a property right and will enjoin unlawful interferences. *Truax* v. *Corrigan,* 257 U.S. 312, 327. And of that interest the trader's interest in his prospect of customers is a chief part which equity will also protect. *Peirce* v. *Society of Sisters,* 268 U.S. 510. Conversely, unless this business injury is proved, it matters not what was the conduct of the defendant. *Mosler Safe Company* v. *Ely Norris Safe Company,* 273

[22]By "unfair competition" we refer to any practice which is held by courts of law or equity to give one trader who suffers a business injury a cause of action against another trader. Many of the authorities stating that "unfair competition" is limited to cases of passing off doubtless would grant relief under some other name in cases which would come under our broad definition.

U.S. 132. To make out the tort, however, more must be proved. Unless the conduct causing the injury is "wrongful" the business injury is no matter. *"The Case of the Schoolmasters"*, Y.B. 11 Hen. 4, f. 47, pl. 21. But, we submit, the injured trader has a remedy whenever he shows that the other invaded his interest in his business by lessening his prospect of customers by an act which society condemns.[23]

The common dictum that "passing off" is "the essence of unfair competition" is not inconsistent with the analysis that a case of unfair competition is made out by proof of the above two elements. Indeed it hits closer to the mark than is at first apparent. The reason is this: Proof of passing off itself proves both "wrongful" conduct and a business injury. First, the defendant has committed an intentional fraud. Second, the very fact that he seeks to sell his goods as if they were the plaintiff's, establishes that his conduct deprives the plaintiff of patronage. The case of passing off, in short, involves *ipso facto* both elements of the cause of action. For that reason it is a typical and simple case of unfair competition.

But it is not the only case. Other illustrations are common provided that injury to the business is made out. To assault a trader's prospective customers is actionable. *Garret* v. *Taylor,* Cro. Jac. 567; *Tarleton* v. *McGawley,* Peake's N.P. 270. Cf. *Truax* v. *Corrigan, supra.* Similarly, it is wrongful to drive away his cus-

---

[23]No other definition of an act which will give rise to a cause of action when loss of customers results appears to be possible. The same difficulty of articulation arises whether there be the *prima facie* theory of torts advanced by Holmes and Wigmore (see *Aikens* v. *Wisconsin,* 195 U.S. 194, 204; *Wigmore, The Tripartite Division of the Law of Torts,* 8 HARV. L. REV. 200; or the contrary thesis of Salmond (see Salmond, The Law of Torts (7th ed.) 9) or even the novel scheme suggested by Callman (see *Callman, What is Unfair Competition,* 28 GEO. L. J. 585). Any definition or single descriptive word assumes the conclusion and is of no assistance in advancing to new conclusions. Yet business men know well enough what is unfair. See remarks of Senators Cummins and Saulsbury, Cong. Rec., 63rd Cong. 2d Sess. pp. 11449, 11593. We shall use the colorless word "wrongful."

tomers by repeated threats of suits for patent infringement. *Maytag Co.* v. *Meadows Mfg. Co.*, 35 F. (2d) 403 (C.C.A. 7th). And if A sells his goods by representing that they are just like B's when they are not, the cause of action is made out because a fraud (i.e., "wrongful" conduct) has caused customers apparently about to buy B's goods to buy those of A. *Motor Improvements Inc.* v. *A. C. Spark Plug Co.*, 80 F. (2d) 385 (C.C.A., 6th), *Vortex Mfg. Co.* v. *Ply-Rite Contracting Co.*, 33 F. (2d) 302 (D. Md.). Those examples confirm the analysis that although proof of "passing off" may be a convenient means to show the tort, the tool must not become the master, and that in each case the questions are (1) was there an injury to the business and (2) do society and its spokesman, the chancellor, condemn the conduct by which the injury was accomplished. In the present case both questions must be answered affirmatively.

(1) Clear and immediate injury to the design originator's business flows from the conduct of the copyist. The petitioners offered to show the myriad of ways in which it injured him—by causing returns and cancellations, by destroying his reputation, by cutting off reorders. Such evidence should be unnecessary for the peculiar nature of the values involved itself proves that actual injury to the originator is the inevitable consequence of the piracy. The chief sales value of a garment lies in the freshness of its design. Every garment made by the copyist destroys that freshness and with it the sales otherwise to be made by the creator of the design. Style piracy, therefore, deprives the originator of patronage just as plainly as assaults upon customers, passing off or threatened suits for patent infringement. There is a business injury. Cf. *International News Service Co.* v. *Associated Press, supra.*

That fact distinguishes this charge that the style pirate is guilty of unfair competition from the vain complaints

against competitors' appropriation of new ideas, embodied in advertising or methods of doing business. *E. g., Estate Stove Co.* v. *Gray & Dudley,* 50 F. (2d) 413 (C.C.A. 6th); *International Heating Co.* v. *Oliver Oil Gas Burner & Mach. Co.,* 288 Fed. 611 (C.C.A. 8th); *Westminster Laundry Co.* v. *Hesse Envelope Co.,* 170 Mo. App. 238; *Germanow* v. *Standard Unbreakable Watch Crystals,* 283 N.Y. 1; Note (1932) 45 HARV. L. REV. 542. In such cases the plaintiff to recover must establish a property right in his idea. Perhaps it should be accorded him and the law is too slow to appreciate and recognize intangible trade values; but the weight of opinion is otherwise. See cases last cited. Compare *R. C. A. Mfg. Co.* v. *Whitman,* 114 F. (2d) 86 (C.C.A. 2d) cert. den. Dec. 16, 1940, with *Waring* v. *WDAS Broadcasting Station,* 327 Pa. 433, and *Waring* v. *Dunlea,* 26 F. Supp. 338 (D.N.C.). See also *Uproar Co.* v. *National Broadcasting Co.,* 8 F. Supp. 358 aff'd. 81 F. (2d) 373 (C.C.A., 1st), 36 COL. L. REV. 1011; *Pittsburg Athletic Co.* v. *KQV Broadcasting Co.,* 24 F. Supp. 490 (W. D. Pa.); *National Exhibition Co.* v. *Teleflash,* 24 F. Supp. 488 (S.D.N.Y.); *Hanna Mfg. Co.* v. *Hillerich & Bradsby Co.,* 78 F. (2d) 763 (C.C.A. 5th), 49 HARV. L. REV. 496. That question is not involved here for, as we have shown, the charge contains the element for want of which those complaints first failed—a showing that direct business injury due to a direct loss of custom resulted from the copying. See Sims, J., concurring, *Crump. Co.* v. *Lindsay,* 130 Va. 144; *Associated Press* v. *Station KVOS,* 9 F. Supp. 279 (D. Wash.) reversed 80 F. (2d) 575 (C.C.A. 9th), reversed with instructions to dismiss for want of jurisdiction 299 U.S. 269, 34 MICH. L. REV. 738. Cf. *Developments in the Law—Unfair Competition,* 46 HARV. L. REV. 1171, 1175.

(2) The conduct of the copyist is "wrongful", that is to say, it is condemned by both the courts and society. As to much of it there is no question. Thus, the court

below correctly held that the copyist could not lawfully sell copies from designs obtained by fraud, burglary or bribery. R. 4679. Accord: *Montegut* v. *Hickson*, 178 App. Div. 94; *Margolis* v. *National Bellas Hess Co.*, 139 Misc. 738.

But even when the copyist avoids those crude methods, his conduct is "wrongful". He systematically, mechanically and continuously appropriates the fruits of the creator's skill, labor and expense. He is not like the wide-awake competitor who espies and fills a particular demand that another may first have noticed. See, *e.g.*, *McGhee* v. *LeSage*, 32 F. (2d) 875 (C.C.A. 9th); *Federal Electric Co.* v. *Flexhume Corp.*, 33 F. (2d) 412, 415 (C.C.A. 7th); *Germanow* v. *Standard Unbreakable Watch Crystals*, 283 N.Y. 1; *Reynolds & Reynolds Co.* v. *Norick*, 114 F. (2d) 281 (C.C.A. 10th); *Jackson* v. *Quickslip Co.*, 110 F. (2d) 731 (C.C.A. 2d); *Sinko* v. *Snow-Craggs Corp.*, 105 F. (2d) 450 (C.C.A. 7th); *Keystone Type Foundry* v. *Portland Pub. Co.*, 186 Fed. 690 (C.C.A. 1st). Cf. *Kaeser & Blair, Inc.* v. *Merchants Ass'n.*, 64 F. (2d) 575 (C.C.A. 6th). The distinction between the two seems obvious.[24] The one leads an independent existence; he himself copies, conceives and adapts. His conduct is part of the daily business and social intercourse by which society "progresses". That process is so much a matter of give and take that neither law nor society can pause to consider whether A has added more than B. The other lives by copying only. In a field where ideas put into tangible form are the prime subject of each sale—the design and not the cloth is what the consumer buys—he steals and sells the others "wares" and makes none of his own. Not only that he steals his advertising and repu-

[24] In the debates on Section 5 of the Federal Trade Commission Act those opposing its passage argued for more certainty in its prohibitions. Senators Cummins and Saulsbury quite correctly replied that every business man knew the difference between what was and was not a fair method of competition. Cong. Rec. 63rd Cong. 2d Sess. pp. 11449, 11593. We submit that the distinction here drawn is equally recognizable.

tation (R. 4319, fol. 12955-12956). He is a deliberate parasite. Copying is his business. NYSTROM, *op. cit. supra* n. 2, 218-219. While, therefore, the law raises no bar to the one, it long has forbidden the other to reap what he has not sown if actual injury to the plaintiff's business is threatened. *Hunt* v. *New York Cotton Exchange*, 205 U.S. 322; *Fonotipia Ltd.* v. *Bradley*, 171 Fed. 951 (S.D. N.Y.); *Prest-O-Lite Co.* v. *Davis*, 209 Fed. 917 (S.D. Ohio) aff'd. 215 Fed. 349 (C.C.A., 6th); *Meccano Ltd.* v. *Wagner*, 234 Fed. 913 (S.D. Ohio) aff'd. in part 246 Fed. 603 (C.C.A., 6th); *Meyer* v. *Hurwitz*, 5 F. (2d) 370 (E.D. Pa.); *Associated Press* v. *Station KVOS*, 80 F. (2d) 575 (C.C.A., 9th), 44 Yale L. J. 877; *Fisher* v. *Star Publishing Co.*, 231 N.Y. 414; Cf. *Uproar Co.* v. *National Broadcasting System*, 8 F. Supp. 358, aff'd. 81 F. (2d) 373.

Cheney Bros. v. *Doris Silk Corp.*, 35 F. (2d) 279 (C.C.A. 2d) and similar cases are not contrary to those decisions. The *Cheney* case involved only the casual copyist and would be relevant only if a property right in his designs were claimed for the creator. But no such property right is claimed here, nor any protection against isolated reproduction. The conduct which we say the law should condemn is deliberate, continuous parasitism. In *International News Service* case this Court condemned it. In *A. L. A. Schechter Corp.* v. *United States*, 295 U. S. 495, 532, the condemnation was reiterated.

Society's contempt for the copyist who is a parasite has been expressed in other ways also. In Germany it was held unfair for a trader to copy mechanically the artificial flowers drawn from natural flowers at great expense by his competitor.[25] Legislative bodies in several countries have awarded the designer protection against

[25]The court considered the precise charge and held that "should even after further investigations the Court not finding a passing off he would have to re-examine whether the means used by the defendant do not intend an unjust enrichment at the expense of the plaintiff and whether these means are in harmony with the requirements of a fair business life." See *Callman, op. cit. supra*, p. 26, 584.

misappropriation of the values resulting from his skill, labor and expense.[26] Congress has never either enacted or rejected the bills introduced but its committees have reported them favorably.[27] Acting conjointly, industry and the executive branch of the government in the NRA codes quite uniformly outlawed the style pirate.[28]

---

[26]In several foreign countries the designer is awarded protection against misappropriation of the values resulting from his skill, labor and expense. The Brazilian Act of 1934 grants a patent to the author of any new and original design and defines a new design as one which has not been used or described in Brazil and does not so imitate another design as to confuse the public. See JOHNSTON & FITCH, *op. cit. supra*, n. 4, 73. France, by law of July 14, 1909, as amended, permits copyright registration of each new design. See 2 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY, Harv. Uni. Press (1935) p. 1018; *Callman, op. cit. supra*, p. 26, 587, note 86. In Great Britain protection is somewhat narrower. The Patents and Designs Act, 7 Edw. VII, c. 29, 9 and 10 Geo. V, c. 80 protects "every new and original design", and the test applied is not the harsh text of genius. See *Re Le May's Registered Design*, 28 Ch. Div. 24 (1884).

[27]In H. REP. 1372, 71st Cong., 2d Sess., the Committee on Patents recommended passage of the Vestal Bill, saying "It has long been established that industrial designs are entitled to adequate protection, but under the present laws it is not possible to obtain adequate protection, and in consequence thereof the original productions of artists and designers are pirated and sold in inferior goods so that their market is impaired or destroyed shortly after they appear on the market." See also SEN. REP. 1627, 71st Cong., 3rd Sess., and SEN. REP. 1280, 72d Cong., 2d Sess. An attack on the bill is contained in Note (1931) 31 COL. L. REV. 1447.

[28]The China and Porcelain Manufacturers' code contained the following provision: "Copying of prints or decalcomania or hand printed patterns or shapes of any American Pottery or China Manufacturers, which is a new and original design, and not an adaptation of foreign or domestic design, shall constitute an unfair method of competition." CCH Trade Reg. Service, Vol. II B, par. 38,645. The Wall Paper Manufacturers' Code provided: "VII—the following shall constitute unfair methods of competition. (a) The copying of designs and/or patterns." *Ibid.* Vol. II A, par. 8518. The Silk Textile code provided: "No employer shall take orders for or print or Jacquard weave any design not registered with the Textile Design Registration Bureau of the Silk Association of America, Inc., or its successor, or do any work on any registered design except with the written consent of the person making the registration." *Ibid.* Vol. II A, par. 8548.18. Similar provisions were included in codes for other industries in which design is important. See *e.g.* Leather Goods Industry Code, American Petroleum Equipment Code, *Ibid.* Vol. II A, par. 8581; Funeral Supply Code, *Ibid.* Vol. II A, par. 8597; Rainwear Division of the Rubber Manufacturers' Code, *Ibid.* Vol. II B, par. 40001.78; Manufacturers of Luggage and Fancy Leather Code, *Ibid.* Vol. II A, par. 8543; Furniture Manufacturers' Code, *Ibid.* Vol. II B, par. 38,655; Manufacturers of Toys and Playthings Code, *Ibid.* Vol. II A, par. 8568; The Cotton Glove Manu-

The Federal Trade Commission itself has specifically condemned the piracy of patterns, styles and designs. In many industries it has accepted rules proposed in Trade Practice Conferences which unequivocally condemned the practice of copying competitors' creations. For example, the Molded Products Industry proposed and the Federal Trade Commission accepted the following rule:

> "Rule 11. A practice has arisen among some manufacturers of usurping the designs or styles of the products of others, and in many instances using them on inferior products, and it is the opinion of the industry that such action on the part of manufacturers is wholly improper from every standpoint of fair dealing and business honesty; therefore the members of the Molded Industry go on record as being unalterably opposed to any piracy of designs or styles, that they condemn such action and that they will make every effort within their power to bring about the discontinuance of such practices." — C.C.H. Trade Regulation Service, Supp., par. 12,580.

In other Trade Practice Conferences this standard rule has been adopted:

> "The practice of usurping designs, styles, or patterns, originated by a competitor, and appropriating them for one's own use within one year after such origination is condemned by the industry."

---

facturers' Code, The Carpet and Rug Manufacturers' Code, *Ibid.* Vol. II B, par. 40,039. Although the Committee on Industrial Analysis reported that the period of experience was too brief to draw conclusions upon whether governmental design protection should be increased, (H. Doc. 158, 75th Cong., 1st Sess. p. 160) the code provisions are strong evidence that those faced with the practice condemned it. In the four clothing industries where no such protection was included in the codes it was only the administrative difficulties which caused the omission and not the lack of opinion condemning the parasite. JOHNSTON & FITCH, *op. cit. supra* n. 4, 136.

With changes in the period of protection that rule has been accepted by the Federal Trade Commission for more than a dozen industries.[30]

The expositions of business morality by courts, by legislatures, by administrative officials, by business men and even by the respondent Federal Trade Commission uniformly brand "wrongful" the practice of systematically and continuously living upon the work of another. Such conduct may and should be judged wrongful without regard to the deeper question of whether a "property right" should be granted to protect the creator of new ideas not protected by existing laws. Such conduct as practiced by the style pirate in the garment industry, it is clear, deprives the originators of sales which they might reasonably expect to make and consequently damages their businesses. It is submitted, therefore, that both elements of the tort exist and that the style pirate is engaged in unfair competition with the petitioners which equity would enjoin them from continuing.

B. *The sole consequence of the FOGA program is to limit the unlawful activities of the style pirates and of the retailers who join with them.*

FOGA was organized and exists to protect the businesses of those manufacturers of original designs who care to join against the deliberate systematic copyist (R. 122, fol. 364, 365). That object it accomplishes in three ways—by obtaining agreements from retailers not to sell copies of FOGA designs, by inducing retailers not to sell such copies by threatening to cut off their supply of dresses of FOGA designs and by actually refusing to

---

[30] *E.g.*, All Cotton Wash Goods, C.C.H. Trade Regulation Service, Supp., par. 12,637; Baby and Doll Carriage (*Id.* par. 12,606), Clothing Cotton Converters (*Id.* par. 12,609), Barre Granite (*Id.* par. 12,640), Embroidery (*Id.* par. 12,608), Greeting Card (*Id.* par. 12,575), Household Furniture and Furnishing (*Id.* par. 12,620), Milk and Ice Cream Can (*Id.* par. 12,597), Upholstering Textile (*Id.* par. 12,550).

sell FOGA designs to any retailer who is marketing a copy of an FOGA design (R. 124, fol. 370-372). The means, therefore, were perfectly adapted to the end, that is to say, FOGA sought not to destroy the copyist but simply to keep his copies out of a portion of the market. Equity would exclude them entirely.

The administration of the program appears to have been fair. Its focal point is, of course, the determination of what is an original and what is a copy. Neither question was decided by members of FOGA: retail men were the judges to insure impartiality (R. 4335, fol. 13002; R. 4337, fol. 13010). To insure personal impartiality also, the alleged copyist was given the right to challenge each member of the panel until three acceptable men were drawn or to have his case judged by a committee of three chosen one by FOGA, one by the alleged copyist and the third by these two (R. 211, fol. 631-632; R. 4338-4340, fol. 13014-13019). To insure expertness the panel was made up of buyers, retail store owners and merchandise managers—the persons whose testimony in court would receive the greatest weight (*Ibid*). Finally, to guard against a mistake the manufacturer of a garment adjudged a copy of an FOGA original by one committee was given a right to appeal to a second (R 4341, fol. 13022; R. 4342-4343, fol. 13026-13028). Only upon the appellate decision or a failure to appeal were the wheels for enforcement set in motion. The system therefore would seem to be as fair as could be devised. Indeed the Commission has not even challenged its fairness.

The respondent has not found the price structure to be affected and the evidence is that it was not (R. 4367-4368, fol. 13101-13102). As the Court below stated, "The case at bar is not one of price fixing" (R. 4677). The respondent did not find that production was decreased; the testimony is that it was not (R. 4368, fol. 13102).

There is no finding that quality was deteriorated; every indication is that it was improved.[31] The Commission did not find that anyone was damaged except the copyist and the retailer who insisted on selling copies of FOGA designs. The former, we submit, had no right to what he lost for it was ill gotten. So with the latter; by knowingly selling copies he intentionally abetted the tort feasor who systematically made them and so became a tort feasor himself. Cf. *Steiff* v. *Gimbel Bros.*, 214 Fed. 569 (C.C.A., 2d). The question then comes down to this: May some manufacturers adopt a form of self-help against unfair competition which simply excludes from a portion of the market the articles by which others compete unfairly?

C. *A method of competition which has no effect except to limit the unfair competition of others is not a violation of Section 5.*

The Court below held that the FOGA manufacturers lawfully might defend themselves against tortious conduct, upon the authority of *Federal Trade Commission* v. *Butterick Pub. Co.*, 85 F. (2d) 522 (C.C.A., 2d) and modified the cease and desist order to permit application of the FOGA program to copies tortiously made by the copyist when he appropriated unpublished designs. This view we submit was correct for two reasons. The error of the court below lay in failing to hold equally tortious the systematic copying of published designs and in failing to permit them to be excluded from the market for the same two reasons.

---

[31] Although there is no finding upon these three points in this record, in *Wm. Filene Sons* v. *Fashion Originators Guild*, 90 F.(2d) 556, at page 560, it was found, after a thorough trial in respect to the same program that "the Guild and its members and affiliates have not fixed or tried to fix prices, have not limited or tried to limit production, and have not caused or tried to cause any deterioration in the quality of their products."

The first reason is that Section 5 of the Federal Trade Commission Act cannot be supposed to have barred all self-help to a trader. The phrase "unfair methods of competition" denotes trade practices similar to but not necessarily the same as those denoted by "unfair competition". The law of unfair competition is part of the law of torts. The law of torts being one of relativity and not of absolutes never bars reasonable self-help against a tortious attack although the same conduct if used offensively might be tortious.[32] In this case the petitioners have combined not to injure the copyist or to destroy any legitimate trade he might acquire but only to preserve their businesses by eliminating that illegitimate part of the copyist's sales which injured them. The petitioners have, as it were, taken ahold of each other's business simply to prevent the copyists from wresting it from each one singly by improper methods.

Second, the Federal Trade Commission Act does not protect from interference trade which has no right to exist. In *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, the Court considered a similar question and said (p. 652): "The court below thought that the trade to be protected 'was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition'. There is much force in this conception of the act, and the language just quoted from the *Winsted* case seems inferentially to lend it support. Certainly, it is hard to see why Congress would set itself to the task of devising means and creating administrative machinery for the purpose of preserving the business of one knave from the unfair competition of another." There are certain qualifications which should be made before that statement could be fully accepted. It would

---

[32]Instances are self-defense, *Brown* v. *United States*, 256 U.S. 335, and the various types of privilege, *Vincent* v. *Lake Erie Transp. Co.*, 109 Minn. 456, *Ploof* v. *Putnam*, 81 Vt. 471.

seem that if the public is found to be injured a respondent could not defend successfully on the ground that his competitors did similar wrongs. For example, a trader should not be heard to defend a charge that he competed unfairly in falsely advertising his products by replying that all his competitors made sales by schemes appealing to the gambling instinct of children. The Act is intended also to protect the public. See *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212; *Federal Trade Commission* v. *R. F. Keppel & Bros.*, 291 U.S. 304. Congress did not intend, however, to vest the Federal Trade Commission with jurisdiction to prevent methods of competition which have no consequences except to limit those activities of others which are unfair and which equity would forbid.[33]

The findings of the Federal Trade Commission show only that this is such a case. The copyist and the retailer who aids him are the only persons found to be hurt. They are engaged in tortious conduct. The FOGA program does no more than limit the field of those tortious activities. Therefore it is not unlawful under Section 5.

---

[33]The Congressional history of Section 5 of the Federal Trade Commission Act supports that conclusion. Mr. Stevens, one of the House Managers, explained the conference report and said of Section 5: "The essence of the practice must be ascertained by the commission if the general purpose and the result of it will be to the detriment of the public by eliminating competition which in the public interest ought to exist, or by injuring those who ought not to be injured by driving out of business that which ought to be sustained and protected. In the interest of the general public, then it is a fraud against the public and ought to be repressed." Cong. Rec. 63rd Cong. 2d Sess., p. 14937.

II.

The Federal Trade Commission Erred in Refusing to Hear Evidence of the Economic Justification for the FOGA Program

No single test can be applied to determine what is an "unfair method of competition" under Section 5 of the Federal Trade Commission Act. Congress deliberately chose a vague phrase.[34] The debates show its belief that a definitive list of the kind of practices intended to be made unlawful could not be drawn up and that any attempt to do so would invite evasion.[35] The reason no doubt is a second fact shown by the debates—the conviction of Congress that the economic conditions and the business facts of each case were the true criteria of unfairness[36] and that accordingly the task of investigating and analyzing the facts and of forming a judgment was one appropriate not for the courts, but for men experienced in dealing with economic and business realities.[37] Congress sought to provide for those expert factual judgments by establishing as the primary body a com-

---

[34]See Report of Committee on Interstate Commerce, Sen. Rep. 597, 63rd Cong., 2d Sess., p. 13.

[35]Senator Newlands, who had charge of the bill, many times reiterated that belief. See Cong. Rec., 63rd Cong., 2d Sess., pp. 10376, 11082, 11083, 11084, 11092. See *Montague, Unfair Methods of Competition*, 25 Yale L. J. 20, for other excerpts establishing this point.

[36]See *Remarks of Senator Newlands, id.* pp. 11084, 11107; of Senator Thomas, *id.* p. 11181, and this Statement of the Managers on the Part of the House: "Whether competition is unfair or not generally depends upon the surrounding circumstances of each particular case. What is harmful under certain circumstances may be beneficial under other circumstances." *Id.*, p. 14924. Before Congress as an example was the Australian Preservation of Industries Act, 1908-1910; it declared "unfair competition means competition which is unfair under the circumstances."

[37]See Henderson, The Federal Trade Commission, pp. 4-16. Cf. Mr. Justice Brandeis dissenting, *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 433. One result of that belief is section 7 of the act. The same thought is a thread running through the debates upon section 5. Cong. Rec. 63rd Cong., 2d Sess., pp. 11083, 11092, 11104, 11112, 11113, 12147, 12216, 14924.

mission which could properly investigate and analyze the factual data in the light of particular competitive conditions. See *A.L.A. Schechter Corp.* v. *United States*, 295 U.S. 495, 532-533. Only the ultimate decision of the legal question of whether a method of competition was unfair was left to the courts. *Federal Trade Commission* v. *Gratz*, 253 U.S. 421.

In making their decisions the commission and the courts are not bound by the common law rules of unfair competition as they stood in 1914. *Federal Trade Commission* v. *R. F. Keppel & Bros.*, 291 U.S. 304, 310-312. Nonetheless they are guided by those precedents which expounded the prevailing business morality, including the disclosures of predatory practices in early Sherman Act cases,[38] and by statutory statements of public policy, for example, by the Sherman Act, *Id.* at 313. Cf. *Federal Trade Commission* v. *Gratz, supra*, at 427; *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U.S. 441. Sufficient criteria are available from those sources to enable the Commission and ultimately the Court to form the requisite economic and moral judgment. Such was the intention of Congress.[39]

In the present case the only question before the Federal Trade Commission was whether the element of combination renders "unfair" the petitioners' program to protect the ladies garment industry by suppressing the

---

[38] See, *e.g.*, *United States* v. *Standard Oil Co.*, 221 U.S. 1; *United States* v. *American Tobacco Co.*, 221 U.S. 106; *United States* v. *General Electric Co.*, 1 D. & J. 267; *United States* v. *Patterson*, 201 Fed. 697, 222 Fed. 599; *United States* v. *American Thread Co.*, 1 D. & J. 449.

[39] "Indeed, the debates themselves suggest, what seems obvious from the text of the Act, that it was the Congressional intention to confer on the Commission subject to court review, the duty of giving a detailed content to the general principle embodied in the phrase, and to employ, in fulfilling this duty, not only the rules and precedents established by the courts at common law and under previous statutes, but the technique of reasoning by analogy and upon principle, with which jurists are familiar." HENDERSON, *op. cit. supra*, p. 86. See especially the remarks of Mr. Covington, Cong. Rec. 63rd Cong., 2d Sess., p. 14928.

evil of style piracy. Nothing is done in the execution of the program which each petitioner could not do alone without danger of criticism. *United States* v. *Colgate & Co.*, 250 U.S. 301, 307; *Federal Trade Commission* v. *Raymond Bros. Clark Co.*, 263 U.S. 565. Cf. *Grenada Lumber Co.* v. *Mississippi*, 217 U.S. 433. Indeed, morality is on the side of the petitioners. A boycott like any combination can be justified; it is only *prima facie* unlawful. *United States* v. *American Livestock Comm. Co.*, 279 U.S. 435. Consequently it was the duty of the Commission to make its determination only after a thorough study of the operation and industrial setting and of the economic causes and effects of the FOGA program. That is the teaching of both the common law and Sherman Act precedents as well as of the history of Section 5. But although the petitioners urged the necessity, the duty to form an expert judgment upon the business facts was not performed. The Commission's failure to perform it cannot be justified by any suggestion that FOGA would be an unlawful combination either at common law or under the Sherman Act, notwithstanding the proffered evidence of what causes produced and what effects flowed from its program.

We shall consider what was the appropriate technique and whether the proffered evidence was sufficient first, from the viewpoint of the Sherman Act and second, from the outlook of the common law.

A.

The Proffered Evidence was Relevant and Material to a Determination of Whether the Petitioners were Violating the Sherman Act.

Notwithstanding the petitioners' careful offer to prove that their combined refusal to deal with copyists was economically desirable and notwithstanding that the

FOGA program affected neither prices, quality nor production, was reasonably adapted and operated fairly to the end sought and granted only limited protection (R. 4307-4327), nevertheless both the Commission and the court below assumed that whether the program was an unfair method of competition should be determined by syllogistic reasoning in absolute terms and not by study of the living social and economic background. The Commission held that any boycott was illegal *per se* (R. 4673). The court below reasoned thus: Equity would not prevent the marketing of copies, therefore the copyist and retailers had an absolute right to market them; the FOGA program interfered with that absolute right, therefore it was unlawful regardless of whether the interests of the FOGA members, of the rest of the industry and of the consumer were all served by the program (R. 4674-4677).

Viewing the case as a Sherman Act controversy, both the view of the Commission and that of the court appear mistaken. Whether a combination is unlawful under that statute cannot be determined *in vacuo* by rigid logic but only by examination of the functioning of the combination and of its interplay with the realities about it. The reason is this: The Sherman Act does not condemn every contract or combination which restrains interstate trade. Its object was protection of the consumer. The ultimate test to be applied, therefore, is whether an actual or necessary consequence of the restraint is injury to the consumer's interests. The determination of that question requires an investigation of the economic data and of all else that may aid to interpret it.

Whatever differences in phraseology with occasional divergences of opinion may appear in them, the leading decisions under the Sherman Act establish it firmly that that is the fundamental issue and that the technique for deciding it. All now agree that the Act does not condemn

every restraint of trade or commerce; the only questions are what restraints are lawful and what unlawful. The dividing line has been said to be the line between "reasonable" and "unreasonable" judged from the viewpoint of the consumer. *Standard Oil Company* v. *United States,* 221 U.S. 1. Cf. *Nash* v. *United States,* 229 U.S. 373. In that generally accepted view "The Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus, in applying its broad prohibitions, each case demands a close scrutiny of its own facts. Questions of reasonableness are necessarily questions of relation and degree." *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344; *Sugar Institute Inc.* v. *United States,* 297 U.S. 553. The essentially similar test stated by Mr. Justice Brandeis also emphasizes that at heart each Sherman Act problem is factual. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, the nature of the restraint and its effect actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy are all relevant facts." *Board of Trade of the City of Chicago* v. *United States,* 246 U.S. 231. The nature of the problem is not altered if the line between lawful and unlawful be located not first by generalization but by directly examining each restraint to determine whether it produced certain definite injuries. "The end sought was the prevention of the restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or other-

wise control the market *to the detriment of purchasers or consumers of goods and services . . .*" *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 493 (italics added). In brief, however the issue be viewed, there must be an analysis of the causes and effects of the restraint to determine its effect upon the economy and particularly upon the consumer.

Doubtless there may be cases where an analysis of the industry is unnecessary in practice—for example, where the restraint is intended to or in fact does control the market price. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150. The reason for the irrelevance of evidence of the industrial conditions in such a case is this: An attempt to fix prices if successful strikes the consumer in his most vital spot; the interest of the consumer that prices shall not be enhanced outweighs any other interest or combination of interests; therefore, the law will hear no attempted justification.[40] In other words, a practice regulating market price is *per se* "unreasonable". *United States* v. *Trenton Potteries Co.*, 273 U.S. 392. The same result perhaps would follow wherever an agreement to limit production was challenged not only because prices would be enhanced but also because the consumer's second vital concern is securing a quantity of goods and services. As to that, however, the law may be less rigid. Cf. *National Association of Window Glass Manufacturers* v. *United States*, 263 U.S. 403. Similarly, the third great concern of the consumer, his interest in the quality of products, might be considered so weighty as to counterbalance the combined interests of all others. Such cases, however, are exceptions. The rule is settled that where the restraint does not regulate prices, production or quality,

[40] But see *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, where the Court seems to have considered that protection of the public health *might* justify a combination regulating prices if the public health could be protected in no other way.

all the economic conditions in the industry, including the purpose and effect of the restraint, must be considered and the conflicting interests evaluated as would be done in the law of torts.[41] For in such a case the question of "reasonableness" is one of fact and not of logic. Of that, the content of the Court's opinions is the best indication. *E.g., Board of Trade of City of Chicago* v. *United States,* 246 U.S. 231; *National Association of Window Glass Manufacturers* v. *United States,* 263 U.S. 403; *Standard Oil Company* v. *United States,* 283 U.S. 163, 169; *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344; *Sugar Institute* v. *United States,* 297 U.S. 553; *Interstate Circuit* v. *United States,* 306 U.S. 208, 230-232.

The instant case falls within the general class and not within the three exceptions.

First, the FOGA program is not intended to and does not regulate prices. Its members have never directly or indirectly interested themselves in the price which a manufacturer may charge for his products (R. 4367-4368, fol. 13101-13102). The Federal Trade Commission has not even hinted that the program enhanced prices or in any way affected the price structure. Cf. JOHNSTON AND FITCH, *op. cit. supra,* n. 4, 60.

Second, the FOGA program does not parcel out or limit production of dresses (R. 4368, fol. 13102). The uncontradicted testimony was to that effect. Again, the Commission did not suggest the contrary.

Third, the FOGA program does not deteriorate quality, the last great concern of the consumer (R. 4368, fol. 13103-13104). Style and originality in ladies' garments are the important criteria of quality. It improves the quality of the products to curb the deceptive selling of copies as originals where as here it does not raise prices and keep exclusive designs from the consumer.

---

[41] See pp. 56-64, *infra.*

The FOGA program, therefore, does not strike the consumer in any one of his three vulnerable spots and is not within any of the three exceptions to the general rule that Sherman Act problems are questions of fact. Since the Federal Trade Commission refused to hear and weigh the facts making possible a proper evaluation of the sundry conflicting interests, it was in error. After strenuous litigation of the facts which the commission refused to hear, it was found in the First Circuit "that The Guild and its members and affiliates have not fixed or tried to fix prices, have not limited or tried to limit production and have not caused or tried to cause any deterioration in the quality of their products . . . that the object of The Guild and its members and affiliates was beneficial, rather than prejudicial, not only to the interests of the dress industry but as well to the interests of the public." See *Wm. Filene's Sons Co.* v. *Fashion Originators Guild of America,* 90 F. (2d) 556, 560. The facts offered to be proved were more than ample to show the combination to be "reasonable".

The decisions of this Court require that conclusion. "Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law." *Sugar Institute, Inc.* v. *United States,* 297 U.S. 553, 598. See also *Board of Trade of City of Chicago* v. *United States,* 246 U.S. 231; *National Association of Window Glass Mfgrs.* v. *United States,* 263 U.S. 403; *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344. Cf. *Maple Flooring Mfgrs. Association* v. *United States,* 268 U.S. 563; *Cement Mfgrs. Protective Association* v. *United States,* 268 U.S. 588. If all retailers and all manufacturers had formed a trade association and agreed not to manufacture or sell copies of original designs and

had enforced the agreement by reasonable penalties, the facts proved or offered to be proved would show the association to be a lawful cooperative endeavor. Its sole purpose and sole effect would be to preserve the industry by eliminating a parasitic practice which was destroying the industry and with it the parasite. That very thing has been done under the auspices of the respondent.[42]

It makes no serious difference that much of the restraint of commerce in the present case arises without consent of the parasite and the very few retailers who opposed the program of most of the interested retailers and the FOGA manufacturers (R. 4325, fol. 12974, cf. R. 124, fol. 372). Even if it be assumed that the copyist will not be prevented by a court from marketing copies, *non constat* that he has an absolute right to do it without interference by anyone. Certainly he had no such right at common law. See pp. 56-64, *infra*. The Sherman Act does not enlarge *his* rights. It too does not guarantee to a trader the right to do without private interference whatever the law does not forbid, regardless of the destructive effect of his conduct upon an entire industry and of the reasonableness of the restraint imposed upon it.

That was decided first in *Anderson* v. *United States*, 171 U.S. 604. Subsequent decisions did not alter the rule. In the next two important cases in this field, *Montague* v. *Lowry*, 193 U.S. 38, and *Eastern States Retail Lumber Dealers Ass'n* v. *United States*, 234 U.S. 600, boycotts were held to violate the Sherman Act but it would seem quite clear that in each a contract, between the members of the combination and the persons against whom it was directed, to accomplish the object of the combinations would have been equally unlawful. More important, the Court did not suggest that it was applying a different

[42] See p. 34, *supra*.

rule than usual because the restraints were aimed at others. Next, *Duplex Co.* v. *Deering*, 254 U.S. 443, and *Bedford Company* v. *Stone Cutters' Ass'n*, 274 U.S. 37, made it clear that no such decision had been intended. In the latter, Mr. Justice Brandeis said, dissenting: "The Act does not establish the standard of reasonableness. What is reasonable must be determined by the application of principles of the common law. . . . Tested by these principles, the propriety of the unions' conduct can hardly be doubted." The majority disagreed but not because they believed some other test was applicable because a boycott was involved; they, too, held that justification was possible.

The motion picture cases did not involve a break in the current of decision. *Binderup* v. *Pathé Exchange*, 263 U.S. 291, revealed a crude attempt to exclude another from the trade. Undoubtedly the Sherman Act gives a trader some protection against combined efforts to drive him out of business; that is because Congress was conscious that wholly to exclude a competitor from the market tended towards monopoly and resulting enhancement of prices. The same consciousness caused Congress to make it unlawful for a trader to agree to withdraw from the market, save in exceptional cases. *Addyston Pipe & Steel Co.* v. *U.S.*, 85 Fed. 271 (C.C.A., 6th) aff'd. 175 U.S. 211. The reason for the parallel rules being the same, it would seem the rule against driving the trader from the market may be subject to similar exceptions. *Binderup* v. *Pathé Exchange, supra*, did not decide the contrary. But that, in any event, is not this case. FOGA does not aim to reduce the number of manufacturers supplying the market by driving the copyist manufacturers out. It aims to make them stop selling copies in a limited area and to compete in it on a basis which is both fair and beneficial to the industry and the consumer. Neither will the FOGA program by eliminating copying

automatically reduce the number of manufacturers supplying the market. There is an ample supply of able and experienced designers for the copyist to employ (R. 4324, fol. 12971). There is good reason to believe that they would be successful. JOHNSTON AND FITCH, *loc. cit. supra*, n. 4, 60. In short, the *Binderup* and similar cases are inapplicable here because the combination is aimed at certain competitive methods injurious to the industry and not at reducing the number of competitors.[43] Likewise, it would seem that the decision in *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30, rested not on the boycott but upon the fear that higher prices would follow that elimination of competition among distributors which would be brought about by use of a uniform contract. The terse opinion in *United States* v. *First National Pictures*, 282 U.S. 44, also is not a precedent here, first, because by the boycott condemned the honest exhibitor was made to suffer to prevent others' frauds and, second, because the alleged evils flowed from block-booking and therefore were of the distributor's own making.

Whatever doubt might have existed upon these decisions, however, has now been allayed. Three recent decisions of the Court show that a cooperative endeavor

[43]This would seem to be a sufficient answer to the suggestion of the Court below that FOGA was also unlawful because if it is successful it will acquire the power to fix prices. We have three other answers. First, the Federal Trade Commission did not find that FOGA would in fact have power to fix prices; the Court could not properly substitute its judgment for the Commission's silence; the facts are not that clear. Cf. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U.S. 568. Second, "the law did not make . . . the existence of unexerted power an offense." *United States* v. *United States Steel Corp.*, 251 U.S. 417, 451. Third, it is obvious that every trade association may shift the emphasis of its activities and using the materials it has acquired lawfully begin to fix prices or production. Cf. *Appalachian Coals Inc.* v. *United States, supra.* Compare *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563, and *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588, with *American Column & Lumber Co.* v. *United States*, 257 U.S. 377, and *United States* v. *American Oil Co.*, 262 U.S. 371. Yet a trade association while its activities are lawful is not to be condemned because it may some day take different action any more than business competitors violate the law by dining together because they may later emulate the guests of Judge Gary.

to regulate others' competitive practices by a concerted refusal to deal is not *per se* a violation of the Sherman Act. In *Sugar Institute* v. *United States,* 297 U.S. 553, the Court did not segregate its discussion of the legal principles applicable to the boycott of brokers and warehousemen from its general decision that a factual analysis must be the basis for a sound decision. On the contrary, it considered the background and effect of the boycott before condemning it. In *Interstate Circuit* v. *United States,* 306 U.S. 208, 230-232, a boycott to regulate the trade practices of those boycotted was held unlawful but only after an explicit consideration of its "reasonableness" and upon the conclusion that the cost outweighed the benefit. Finally, in *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, a conspiracy intended to keep a manufacturer's goods out of the market until he changed his competitive methods was held not to violate the Sherman Act.

The decisions of this Court do show, therefore, what appeared true on principle—that an industry is not rendered powerless to rid itself of a destructive evil by the recalcitrance of those who would destroy it for their own selfish advantage. The doctrine expounded in the *Appalachian Coals* and *Sugar Institute* decisions is applicable in those circumstances. They are the circumstances here. Prior to the formation of FOGA the industry was in such a chaotic state that business mortality among manufacturers was twenty-five per cent a year. The FOGA program in order to save the industry sought to reduce copying by protecting original creations but not imports for three months, and in such a way that there remained outlets for the copyist of FOGA designs and sources of originals for non-cooperating retailers. The program operated fairly; the system of arbitration was as equitable as could be devised. Its consequences where these: The copyist and non-cooperating retailer suffer "great financial losses" (R. 130, fol. 389-390); there is,

however, ample opportunity for them to compete if they abandon their unethical practice; market price is unaffected; production, undiminished; quality, improved; FOGA has operated "to the benefit of manufacturer, retailer, consumer and laborer . . . [and] has resulted in increased competition on an ethical, fair, competitive basis and has resulted in a decrease of failures and of losses in the industry" (R. 4325, fol. 12975). On those facts no one could conclude that the restraint was unreasonable. Those were found to be the facts by the courts which have considered the evidence. *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild*, 14 F. Supp. 353; 99 F. (2d) 556. On that evidence the restraint was held lawful. The Circuit Court of Appeals said: (at p. 560)

> "that the red card system, adopted and enforced by The Guild, does not constitute or result in an illegal boycott; that the concerted refusal on the part of members and affiliates of The Guild to sell to retailers who refuse to protect the original creations of such members and affiliates involves no denial or abridgement of the right of fair competition either as between manufacturers or as between retailers; that there is nothing arbitrary, capricious, unreasonable or unduly coercive as a matter of law in either the anti-piracy activities or the fair-trade practice regulations of The Guild; and that the means adopted by The Guild for carrying out its anti-piracy program are reasonable and do not unduly restrain interstate commerce."

One paragraph of the opinion below requires brief comment before concluding discussion of the Sherman Act. The court stated that FOGA "aimed at monopoly" because it sought to secure for each manufacturer control of all reproductions of each of his original designs

and that, it said, is monopoly because a copyright for a design would be ranked as a monopoly (R. 4678). Confusion between the different meanings of monopoly must not be allowed to lead to the conclusion that that fact, if true,[44] would render FOGA unlawful regardless of its causes, functions and consequences. FOGA and its members do not "monopolize" in the sense the word is used in section 2 of the Act.[45]

Monopoly is a word of many meanings. According to one technically correct legal definition it is the sovereign grant of an exclusive right or privilege. A copyright is an example, and the court below used the word in that sense. But section 2 obviously does not speak of monopoly in any such sense; when it was enacted the fear of monopoly by sovereign grant had died. See *Standard Oil Co.* v. *United States,* Argument for United States, 221 U.S. at 24-26. Another correct use of "monopoly" is to describe the control nearly every trader has of his product. Our economy is composed of countless little monopolies. See CHAMBERLAIN, THE THEORY OF MONOPOLY (1935) Harv. Uni. Press, esp. ch. IV. Section 2 obviously does not use the work in that sense either. It speaks of "monopolizing *any part* of the trade or commerce among the states".[46] If "monopolizing" meant excluding others or securing to oneself alone, then every trader would be violating the Act for every trader seeks to exclude others from and to

---

[44]The premise is not true. FOGA does not interfere at any time with the making of copies or with the marketing of copies in 80% of the retail outlets. See note 11, *supra.*

[45]It seems unlikely that the court intended to imply the contrary. The paragraph in question is expressly directed only to the error assigned below that the commission erred in admitting and excluding evidence of the volume of sales of FOGA members as compared to the volume for the whole industry. The first sentence of that paragraph so indicates. And the structure of the whole opinion shows that the court had decided every other point before coming to that one. But the most convincing reason for thinking so is that the charge of attempting a monopoly certainly cannot be levied at the retailer petitioners.

[46]Italics supplied.

secure to himself alone just as large a part of the trade or commerce among the states as he is able. But "to monopolize" has another meaning. At common law "to monopolize" was to commit the essential wrong in the ancient crimes of engrossing, forestalling and regrating —to tamper with the flow of goods into the market by acts outside the normal course of trade in such a way as to enhance prices or otherwise injure the consumer. *Standard Oil Co.* v. *United States,* 221 U.S. 1, 53; *Adler, Monopolizing at Common Law and Under the Sherman Act,* (1917) 31 HARV. L. REV. 246, 258-263. If "monopolizing" in section 2 be given that meaning, section 2 can be read straightforwardly. So read, it prohibits any acts outside the normal course of trade by which one secures such control over any part of the trade or commerce among the states as enables him to wrong the customers.

Consideration of the spirit and purpose of the Sherman Act makes it apparent that that interpretation is correct. The consumer who required passage of the Act was not interested in technical definitions. For years he had viewed the evils which had flowed from the monopolies of Elizabeth and James I as proof that "monopoly" existed and that there was an undue "restraint of trade". See *Standard Oil Co.* v. *United States,* 221 U.S. 1, 56, 58. "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . ." *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 493. Accordingly section 1 prohibits all contracts, combinations and conspiracies having an undue tendency or a purpose to accomplish those results. Section 2 "seeks, if possible, to make the prohibitions of the act more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade by any attempt to

monopolize or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced with the general enumeration of the first section". *Standard Oil Co.* v. *United States*, 221 U.S. 1, 61. In other words section 1 prohibits agreements outside the ordinary course of trade which fix or are intended to fix price, quantity or quality or which increase the power of the parties to fix them whereas section 2 prohibits all acts outside the ordinary course of trade which regulate price, quantity or quality or which secure to anyone the power to do it, even though there be no agreement. Where there is an agreement "to monopolize" under section 2, therefore, there is a contract in restraint of trade under section 1; and conversely, if there is an agreement but it is not in restraint of trade under section 1, then it is not a conspiracy to monopolize under section 2. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, note 59 at p. 226; *Standard Oil Co.* v. *United States*, 221 U.S. 1, 61.

It follows that whether or not FOGA seeks for each member a monopoly like a copyright is immaterial and that the Commission erred for the reasons already given. Briefly restated in the language of section 2 they are these: To monopolize is to control the market to the disadvantage of those who consume. If that control be the power to fix prices, production or quality, perhaps monopolization is proved without need of further facts. But that is not the case here. Each dress even if its design be unique competes with countless other dresses. Therefore even if there were no copies the price, production and quality of the reproductions made by the originator should result from the unregulated operation of normal market forces. Certainly, the Commission did not find the contrary, and it could not, without hearing the evidence which it excluded. Similarly, it could not tell whether the public interest was otherwise prejudiced

because it refused to learn the facts. The fundamental error from the viewpoint of section 2 is the same as from that of section 1: the Commission had a factual question before it—whether the FOGA program caused or threatened the evils which mark "monopolizing"—yet it refused to hear the facts.

B.

The proffered evidence was relevant and material to a determination of whether the petitioners' conduct was of the kind tortious at common law.

Viewed from the law of torts it seems plain that, even if the business of the copyist is legitimate, the FOGA program could be shown to be lawful notwithstanding that it interfered with that business. The law of torts, and particularly the law of business torts, is not one of absolutes. A concerted refusal to deal is to be judged as any combination. It is not the refusal to deal but the concert which requires justification. *Federal Trade Commission* v. *Raymond Bros. Clark Co.*, 263 U.S. 565; *Grenada Lumber Co.* v. *Mississippi*, 217 U.S. 433. Compare *United States* v. *Colgate Co.*, 250 U.S. 300, with *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U.S. 441. And a combination to injure another in his trade or business is a tort only if it is not justified. See *United States* v. *American Livestock Comm. Co.*, 279 U.S. 435.

To determine whether a combination is justified is ultimately to evaluate conflicting interests in the light of a wise social policy. "The true grounds of decision are considerations of policy and social advantage; and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody

disputes." See Holmes, J., dissenting in *Vegelahn* v. *Gunter*, 167 Mass. 92, 106.[47]

Two factors are always present—the interest of the persons against whom the action is directed in freedom to do business as they will and—to set against it—the interest of the members of the combination in protecting their own businesses and in conducting them as they choose. The courts often have looked no further but, apparently believing that the interests balance, have said that competition was a justification and refused to intervene. *Mogul S. S. Co.* v. *McGregor*, [1892] A.C. 25 (House of Lords), 23 Q.B. Div. 598 (Court of Appeal). Boycotts, therefore, have usually been held lawful where competition in trade was the justification pleaded. *Sorrell* v. *Smith*, [1925] A.C. 700 (House of Lords); *Robitaille* v. *Morse*, 283 Mass. 27; *Bohn Mfg. Co.* v. *Northwestern Lumbermen's Association*, 54 Minn. 223; *McCaulley* v. *Tierney*, 19 R.I. 255. Judged by this test and by the uniform current of decision the FOGA program plainly does not involve any actionable tort.

We do not suggest, however, that the program should be judged by so limited a test. Maturer analysis has shown that the interests to be evaluated in determining whether a concerted refusal to deal is justified should be broken into smaller divisions and weighed in sharper

---

[47] It is submitted that this is true whether one select as his scheme for synthesis and analysis the *prima facie* of torts adopted by Holmes and Wigmore (see *Aikens* v. *Wisconsin*, 195 U.S. 194; *Wigmore, The Tripartite Division of the Law of Torts*, 8 Harv. L. Rev. 200) or the thesis of Salmond (*Salmond, The Law of Torts* (7th ed.) 9). Even the less familiar schemes like Callman's thesis that there is an order of peace and an order of conflict, the latter being one governed by the "rules of the game" (see *Callman, What is Unfair Competition*, 28 Geo. L.J. 585), force one to the same conclusion. The reason is that wherever there is a conflict its resolution ultimately depends upon what data is considered and what weight is given to each item. The great difficulty has been one of articulation and it is not for many years that jurists have plumbed the familiar phrases. The development of the law of conspiracy from *Mogul S.S. Co.* v. *McGregor*, 23 Q.B. Div. 598, to 4 *Restatement of Torts*, §765, is an illustration.

scales. Among the factors to be considered are: (1) the immediate object of the combination, (2) the nature of conduct at which the combination is directed, (3) the necessity and appropriateness of the combination to accomplish the ultimate end sought, (4) the manner in which the boycott is practiced, (5) the relative hardship of the alternatives imposed upon those against whom the combination is aimed, (6) the harm resulting to members of the combination from the conduct against which the conspiracy is directed, and (7) most important, the effect upon those not immediate parties to the dispute, *i.e.*, upon all others in the industry and upon the consumer as well. Compare 4 *Restatement*, Torts, §765; *Handler, The Sugar Institute Case and The Present Status of The Anti-Trust Laws*, 36 COL. L. REV. 1, 14, 17.

It seems too clear for argument that those proper tests cannot be applied unless the data concerning each factor and the whole economic background giving them substance and showing their interaction, is before the body charged with making the evaluation. The basic vice in the Commission's procedure in this case is that it laid aside even the common law technique in favor of *a priori* reasoning.

The proffered evidence, moreover, clearly indicates that the concerted refusal to deal might be justified by the business situation and therefore be "fair". The facts proved or offered to be proved show that if the Commission had believed the proof and had judged the case by expertly evaluating the seven controlling factors its judgment would have been, or at least might have been,[48] that the boycott was not tortious.

[48] Where an administrative commission proceeds on an erroneous legal theory and therefore does not consider the relevant facts it is not for the Court to make the judgment in its stead. Hence, the case must be remanded if, from the facts contained in the offer of proof, the Commission might have concluded that conditions justified the boycott. Under such circumstances the Court will not attempt to draw the factual conclusions but will remand the case to the Commission. See p. 67, *infra*.

(1) The immediate purpose of the boycott is to secure to each originator of designs some of the fruits of his own expense and labor by keeping copies of original FOGA creations from being sold in the same retail stores as originals. The broad objective was to preserve the industry. In short, the combination that is FOGA, and its program, are no more than the device adopted by originators with the aid of retailers to protect themselves, the industry and the consumer from the ravages of the copyist.

(2) As the purpose of FOGA is protection against copying, so the acts at which the combination is aimed are the manufacture and marketing of deliberate copies of FOGA designs. The copyist systematically appropriates the skill and outlay of the originator. Such deliberate continuous misappropriation of trade values is, we submit, unlawful when, as here, it injures the business of their creator (see pp. 22-35, *supra*). But even if practical difficulties prevent equity from checking him, certainly this parasite commends himself to no one;[49] and that is true quite apart from the material damage which he causes. Cf. *Cheney Bros.* v. *Doris Silk Co.*, 35 F. (2d) 279, 281 (C.C.A. 2d); *Nat Lewis Bags, Inc.* v. *Carole Bags, Inc.* 83 F. (2d) 475, 476 (C.C.A. 2d). The retailer selling copies is little better in law or morals. If he insists upon selling a copy after it is called to his attention, he sanctions the piracy and takes a position like that of a contributory infringer. Cf. *Steiff* v. *Gimbel Bros.*, 214 Fed. 569 (C.C.A. 2d).

(3) The FOGA program is appropriate and necessary if effective design protection is to be achieved (R. 4307, fol. 12921). Originators seeking to defend themselves

---

[49] "The opposition to design protection does not directly deny that there is an ethical factor in favor of the proponents." JOHNSTON AND FITCH, *op. cit. supra* n. 4, 47.

against style piracy had to adopt some form of self-help. The design patent and copyright laws even where applicable in theory are valueless to the dress designer in practice. See JOHNSTON AND FITCH, *op. cit. supra* n. 4, 96-98; R. 4325, fol. 12973. Court help, based on the common law principles which we have discussed might be obtained but it would seem that the Court processes would be too slow to be useful (Cf. R. 4325, fol. 12973).

They also had little choice but to adopt some form of combined action. The copyists are not combined but their economic weight is wholly on one side. Each originator alone might survive against the ravages of a single copyist but he could not hope to protect himself against a flock.[50]

The program adopted is only as broad as is necessary to accomplish its purpose. The boycott is sharply limited in scope; it is invoked only while copies of FOGA designs are being sold. Likewise, the protection granted is limited both as to subject matter, as to time and as to place. Only designs which in fact are the original designs of FOGA members are protected; "imports", licensed copies of foreign designs, are not. Protection lasts only three months; thereafter the design is open to copying. Protection is granted only in 19.8% of the

[50]It has been urged that the relative economic strength of the warring parties should be given great weight. See *Handler, Unfair Competition*, 21 IOWA L. REV. 175, 208. This suggestion has several faults unless followed with great caution. First, it seems to make lawful a boycott aimed at an undesirable (but not unlawful) end if the fight seems likely to end in a draw and, conversely, to condemn a boycott aimed at accomplishing an end all the world held desirable if the conspirators were economically so strong as to be sure of success. Secondly, if the suggestion is based upon the premise that the law insists that the fight be a fair one in the sense that the combatants must be of a weight, then it appears to overlook the fact that a light fighter can sometimes more than make up for his lack of weight by his lack of scruples. The case at bar is an example.

However that may be, it is important to note here that the copyists are in fact acting in unison against the originators and that FOGA is not directed against individual copyists but against the conduct common to the members of that class. Hence the suggested test is met.

retail outlets; copyists may sell copies of FOGA designs in all others.

(4) The administration of the program appears to have been fair beyond whisper of criticism. What is an original and what is a copy, is not decided by members of FOGA; retail men were the judges to insure impartiality (R. 4335, fol. 13002; R. 4337, fol. 13010). To eliminate any chance of bias the alleged copyist was allowed to challenge each member of the panel until three acceptable men were drawn or to have his case judged by a committee of three chosen, one by FOGA, one by the alleged copyist and the third by these two (R. 211, fol. 631-632; R. 4338-4340, fol. 13014-13019). The panel was made up of buyers, retail store owners and merchandise managers—the persons whose testimony in court would receive the greatest weight (*Ibid.*). An appeal lay (R. 4341, fol. 13022; R. 4342-4343, fol. 13026-13028).

(5) The Federal Trade Commission found that copyists have suffered "great financial loss" (R. 130, fol. 389). The hardship to them, however, was limited by four factors. First, there were ample retail outlets to which they might sell copies of FOGA designs; only 19.8% of the retailers were cooperating with FOGA.[51] Second, they might sell everywhere copies of designs other than those originated by FOGA.[52] Third, the copyists had free rein the ensuing year; protection even in theory was limited to six months (Exhibit 1).[53] Fourth, there was ample opportunity for the copyists to compete honestly; plenty of able designers were available (R. 4324, fol. 12971).

---

[51]See note 11, *supra*.

[52]See note 12, *supra*.

[53]See also note 10, *supra*.

The Federal Trade Commission also found that the retailer who refused to cooperate suffered "great financial loss" from the FOGA program (R. 130, fol. 389). That loss, however, resulted from their own deliberate and persisting choice. Had those retailers agreed to the program they would have been better off than they were prior to the formation of FOGA (R. 4318-4319, fol. 12953-12956; R. 4325, fol. 12975).

(6) Whatever may have been the losses to the copyists and non-cooperating retailers they were more than offset by the curative effects of the program. Style piracy caused the manufacturer of originals to suffer cancellations and returns of orders, ruined his reputation and good will, destroyed the value of the originals and reduced the recorders of each design (R. 4316, fol. 12946-12948, R. 4317, fol. 12951). The result prior to the advent of FOGA was that "the business mortality of those who attempted to engage in the creation of styles [*i.e.* designs] was 25 per cent per year" (R. 4315, fol. 12945). "The sole and only reason" that each member joined FOGA was "that in his opinion the elimination of style piracy was absolutely necessary and essential if such persons were to be able to continue in business" (R. 4322, fol. 12964).

Style piracy also severely damaged the retailers by destroying the confidence of consumers (R. 4318-4319, fol. 12953-12956). The retailers who subscribed to the FOGA program subscribed "in recognition of the existence of the evil and because they believed the elimination of style piracy absolutely necessary to their continuance in business" (R. 4325, fol. 12974). Their belief, as such, would not justify their conduct; but there is no reason to suppose that what the 12,000 retailers believed is untrue, and the fact, if true, is surely relevant.

(7) We turn now to the final and weightiest factor in the ultimate evaluation—the interests of the consumer. They are not endangered by the program; on the contrary they are advanced.

First, the FOGA program does not regulate the price structure. It has never directly or indirectly interested itself in the price at which a manufacturer or retailer may sell his products (R. 4367-4368, fol. 13101-13102). The Federal Trade Commission has not even hinted that the FOGA program enhanced any prices of any garment or any design or in any way affected the price structure. Cf. JOHNSTON & FITCH, *op. cit. supra*, n. 4, 60.

Second, the FOGA program does not parcel out or limit production of dresses (R. 4368, fol. 13102). The uncontradicted testimony was to that effect. The Commission did not suggest the contrary. Neither can it be reasoned that the program threatens to reduce the supply of dresses or of designs because it prevents copies from being sold by cooperating retailers. For all that appears, originals may take their places in the market or the copies may find buyers in non-cooperating stores.

Third, the FOGA program does not deteriorate quality, the last great concern of the consumer (R. 4368, fol. 13103-13104). That must be taken as true on this record for the Commission refused to hear evidence on the point. (R. 4324, fol. 12971-12972). On the contrary the elimination of the deceptive selling of a multitude of copies is a great advantage to the consumer (Cf. R. 4320, fol. 12958-12960).

The foregoing brief survey of the evidence which the petitioners introduced or offered upon the vital factors to be evaluated in deciding whether the FOGA program was "unfair" upon analogy to the principles of the law of torts makes it abundantly clear that the boycott would be

found "justified" as a matter of tort law and "fair" if the proffered evidence were believed. Cf. 4 *Restatement of Torts*, §765, especially Illus. 5, 6; *Sorrel* v. *Smith*, [1925] A.C. 700 (House of Lords); *Robitaille* v. *Morse*, 283 Mass. 27; *Bohn Mfg. Co.* v. *Northwestern Lumbermen's Association*, 54 Minn. 223; *McCaulley* v. *Tierney*, 19 R.I. 255. The only injury which the Commission found anyone to have suffered was "the great financial loss" suffered by the copyists and the non-cooperating retailers. The ethics of their conduct not even they themselves will defend. The offered proof showed that the honest manufacturer, the retailer, the laborer and the consumer all were tremendously benefited by the work of FOGA. From the viewpoint of the common law, therefore, as well as from the viewpoint of the Sherman Act, the Commission erred in refusing to consider the proof which was offered.

We return now to Section 5 of the Federal Trade Commission Act. The respondent acted without regard to the world in which petitioners acted; it judged and condemned the petitioners *in vacuuo*, pausing to consider realities only to find how the petitioners acted and that the style pirate and the retailer who deliberately gave him a market were injured. The respondent refused to learn the facts of the industry and to consider whether the concerted refusal of the retailer petitioners to market copies of FOGA originals and of the manufacturer petitioners to sell to retailers who did market them was not in fact a benefit to the industry and to the consumer, accomplished without affecting the price structure or the cost of high styled designs to low income consumers, without limiting the supply of ladies' garments, without lowering stand-

ards of quality in workmanship, materials or design and without any other injury to the consumer.

That was error. If direct precedent is needed to show that a boycott can be justified against the charge that it is an "unfair method of competition", it exists in *United States* v. *American Livestock Commission Co.*, 279 U.S. 435. Therefore the issue before the Commission was essentially a difficult question of policy, and questions of policy are initially questions of fact and degree. The petitioners offered to prove a moral and an economic justification for their program. On affidavits a district court judge found true most of the facts set forth in the offer of proof and concluded that the program was lawful. *Wm. Filene's Sons Co.* v. *Fashion Originators Guild of America*, 14 F. Supp. 353, (D. Mass.). A master in chancery after prolonged litigation found true every ultimate fact offered to be proved and most of those offered as subsidiary to them. The district judge and the Circuit Court of Appeals confirmed his findings. *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild of America, Inc.*, 90 F. (2d) 556 (C.C.A., 1st). Both courts believed those facts to show that the attempt to restrict style piracy was reasonable and should continue. A state appellate court earlier reached the same conclusion. *Wolfenstein* v. *Fashion Originators Guild*, 244 App. Div. 656. This Court has held upon precisely analogous facts that piracy which caused loss to the creator was to be forbidden by the courts. *International News Service Co.* v. *Associated Press*, 248 U.S. 215. The Federal Trade Commission has given its approval in similar industries to Trade Practice Codes outlawing design piracy. N.R.A. codes also condemned the copyist.

Under such conditions the Commission manifestly erred in condemning the petitioners' program without hearing.

Systematic piracy certainly should be condemned unless some strong public policy requires its continuance. Note, (1935) 44 Yale L. J. 877. Even in cases where the creator has been denied the aid of equity, the court has stayed its hand only because the court room is not the forum suited to developing those manifold facts of the industry which are essential to a decision. *Cheney Bros.* v. *Doris Silk Corp.*, 35 F. (2d) 279, 281. Cf., Mr. Justice Brandeis dissenting, *International News Service Co.* v. *Associated Press*, 248 U.S. 215, 267. The same philosophy requires condemnation of protective measures against the design pirate and the consequent blessing upon the piracy to be withheld until all the facts are shown. To discover and weigh such facts—to create a body in a position to formulate a policy—and thus to remedy the handicaps of the courts was the purpose of those who set up the Federal Trade Commission. The announcement of "the rule of reason" in the *Standard Oil* and *American Tobacco* cases engendered the beliefs that the courts were attempting to solve economists' problems and that a trained body of men could both operate more efficiently and make sounder decisions. See *Henderson, loc. cit. supra. Cf.*, Mr. Justice Brandeis dissenting, *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 433; Cong. Rec., 63rd Cong., 2d Sess., pp. 11083, 11092, 11104, 11112, 11113, 12147, 12216, 14924. For that reason the Federal Trade Commission was created with the avowed purpose of lodging the administrative functions committed to it in "a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected," and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would "give to them an opportunity to acquire the expertness in dealing with these special questions

concerning industry that comes from experience." SEN. REP. 597, 63rd Cong., 2nd Sess., pp. 9, 11.[54]

The failure of the Commission to exercise the function for which it was created cannot be cured by speculation or argument in the courts. In view of the offer of proof and the extrinsic evidence that there is much support for it, no findings could possibly be added to those of the Commission. *Federal Trade Commission* v. *Curtis Publishing Company,* 260 U.S. 568. Moreover, in a case of this kind the Commission's expert judgment made upon proper investigation and analysis might be of great aid to the court. *Federal Trade Commission* v. *R. F. Keppel & Bro.,* 291 U.S. 305, 314.

CONCLUSION

It is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

CHARLES B. RUGG
MILTON C. WEISMAN
Counsel for Petitioners

ARCHIBALD COX
MELVIN A. ALBERT

January, 1941.

---

[54]In the Senate Senator Newlands, in charge of the bill, said "This Tribunal, composed of economists and lawyers and men experienced in industry, is called upon to apply this standard . . . to the varying facts, situations and conditions affecting interstate trade." Cong. Rec., 63rd Cong., 2d Sess., 11113. Senator Hollis, who also played a leading role continued the explanation later and stated that in each case there would be "an investigation such as no court has the facilities for making" and "findings by a commission composed of men whose judgment on a question of business practice, by reason of their comprehensive knowledge and experience, will be entitled to great weight." *Ibid,* p. 12,147. The Managers on the Part of the House explained in submitting the Conference Report that "Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under other circumstances" and that therefore the prevention of unfair competition "can be best accomplished through the action of an administrative body composed of practical men thoroughly informed in regard to business who will be able to apply the rule enacted by Congress to particular business situations," *Ibid,* p. 14924.

APPENDIX

Federal Trade Commission Act, Section 5, 38 Stat, 719, 15 U. S. C. A. §45:

"SEC. 5. Unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

Sherman Act, Sections 1, 2, 26 Stat. 209, 15 U. S. C. A. §§1, 2:

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

"Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

BLANK PAGE